

# Judicial Reform in Afghanistan: Towards a Holistic Understanding of Legitimacy in Post-Conflict Societies

Maren Christensen\*

## INTRODUCTION

A holistic understanding of the rule of law requires practical sensitivity to interconnected issues. Changes or challenges in one area will impact the status of rule of law as a whole. Such sensitivity is especially essential in post-conflict environments, where most if not all aspects of rule of law demand attention. In particular, judicial independence is a central requirement for effective rule of law, but its development is not isolated from other issues. This investigation seeks to elucidate the connections between building judicial independence, engagement with traditional justice, and anti-corruption efforts through an examination of judicial reform in the first few years of post-Taliban Afghanistan.

International efforts to improve the rule of law in Afghanistan have taken a narrow, passive approach. In particular, the international community has neglected traditional justice systems of *jirga* and *shura* in Afghanistan, which represent a different mix of values of law and justice in each region. However, Afghanistan's history of tensions between state and society and failed efforts at top-down judicial reform compel rule of law practitioners to explore opportunities for engagement with traditional justice.

Furthermore, the international community has neglected capacity building, particularly at the institutional level. Judicial training has been under-resourced, and neglected gaps in institutional leadership have

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\*. J.D. Candidate, U.C. Berkeley School of Law, 2013; M.A.L.D., The Fletcher School of Law and Diplomacy, 2010. Thank you to Professors Louis Aucoin, Ayesha Jalal, Antonia Chayes, Cheyanne Scharbatke Church, and my dear colleague Beka Feathers, for their thoughtful comments, suggestions, and encouragement.

stifled development of the permanent justice sector institutions. As a result, the Ministry of Justice, the Supreme Court, and the Attorney General's Office have struggled with factionalism and territoriality. Institutional ineffectiveness has prompted a perception of corruption in the judicial arena, both in terms of bribery and inappropriate actions at the institutional level.

These failings have prevented the judiciary from becoming independent, accountable, and culturally viable. Rural communities, which comprise 80% of the Afghan population,<sup>1</sup> continue to exist in varying degrees of isolation from the state, turning to traditional justice and largely rejecting the formal system because they perceive it to be corrupt, slow, and culturally unfamiliar. Insurgent forces harness heightened tension between Afghan communities and the fledgling state to further divide the nation and prevent the state from building legitimacy. However, traditional justice systems pose their own difficulties, particularly in terms of women's and children's rights, as well as co-option by warlords in many communities. The administration of justice as a whole in Afghanistan will not recover unless the formal and informal systems of justice cooperate with each other and the formal system achieves a level of popular legitimacy that allows it to be simultaneously modern, effective, and genuinely Afghan.

## I. BALANCING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Judicial independence is central to rule of law because it allows for the administration of justice to occur freely, without inappropriate influence. Because inappropriate influence may occur at the level of individual decision-making or at the level of institutional judicial policy, judicial independence is best understood according to two types: individual and institutional.

At the individual level, judicial independence means autonomy in legal reasoning, which entails autonomy from public opinion as well as other judges.<sup>2</sup> However, Burbank argues that absolute independence in individual reasoning would leave too much room for mental and

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1. Ali Wardak, *Building a post-war justice system in Afghanistan*, 41 CRIME, LAW & SOCIAL CHANGE, 319, 326 (2004).

2. Owen Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 58 (1993) (Discussing the importance of how detachment from the parties is particularly important when one of the parties is a state body).

emotional deviation from the proper application of the law.<sup>3</sup> Therefore, there are many factors limiting individual judicial autonomy. In common law systems, autonomy from other judges is limited by *stare decisis*. In both common and civil law systems, appellate courts exercise control over lower court decisions.<sup>4</sup> Because judicial independence depends on public respect, even reverence, for the judicial process itself, popular legitimacy also counterbalances individual autonomy.<sup>5</sup>

Institutional judicial independence may also be broken down into two types: administrative and political. Administrative independence concerns the operation of courts as well as the process of appointing, transferring, promoting, evaluating, and disciplining judges.<sup>6</sup> The judiciary as a whole cannot control its own institutional development if the executive or legislative branches substantially control its budget and general operations. Furthermore, judges are less likely to make independent decisions if they are concerned about how their opinions will impact their careers.

Political independence concerns inappropriate political control in general, but particularly the influence of the executive's department of the ministry of justice. If the public perceives such influence, it may be characterized as corruption. Independence in judicial career processes therefore overlaps with political independence, because frequently the executive will directly or indirectly dictate appointments or other career decisions for judges.<sup>7</sup>

As with individual judicial independence, total independence or isolation at the institutional level is not desirable. In a democratic society, institutions of government should be responsive to society as a whole, including other institutions of government.<sup>8</sup> The relationship between independence and accountability is therefore unique to each

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3. STEPHEN B. BURBANK, BARRY FRIEDMAN & DEBORAH GOLDBERG, *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 12 (Sage Publications 2002).

4. Fiss, *supra* note 2.

5. BURBANK, *supra* note 3, at 34.

6. INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS (IFES), *INDICATORS FOR A STATE OF THE JUDICIARY REPORT: A STANDARDIZED TOOL FOR MONITORING AND REPORTING ON THE IMPLEMENTATION OF KEY JUDICIAL REFORMS* (Jul. 1, 2003), *available at* [http://www.ifes.org/~media/Files/Publications/Conference%20Papers%20and%20Reports/2003/152/State\\_of\\_the\\_Judiciary\\_Report\\_Indicators\\_EN.pdf](http://www.ifes.org/~media/Files/Publications/Conference%20Papers%20and%20Reports/2003/152/State_of_the_Judiciary_Report_Indicators_EN.pdf).

7. *Id.* at 7.

8. Fiss, *supra* note 2, at 60.

society.<sup>9</sup>

Navigating this tension between independence and accountability depends on the demands of a particular context. However, most civil law countries have a judicial council that acts as a buffer between the judiciary and the government in handling matters of administration, career processes, and other matters of judicial policy.<sup>10</sup> Some judicial councils hold mere advisory roles, while others make binding decisions on all of the above matters. The composition of the judicial council is critically important because it is supposed to represent a microcosm of the desired balance of independence and accountability. Garoupa and Ginsberg argue that the majority of council members should be judges themselves, because they possess the expertise and the heightened interest in the matters at hand.<sup>11</sup> However, general interest in accountability also requires the Ministry of Justice, Attorney General, law professors and expert members of civil society to have some level of representation. The council may provide further nuance to its interpretation of the separation of powers by sharing certain functions with other branches of government, such as managing budget, material resources, and operations,<sup>12</sup> or by excluding certain members from certain council activities, such as excluding members of the executive from disciplinary matters. There is, however, no universally ideal model for a judicial council, and it is essential to understand the particular issues around independence and accountability in a given society in order to design a council that addresses these tensions head-on.

Building judicial independence in post-conflict societies is only possible where practitioners are sensitive to a more complex notion of legitimacy. The current government in Afghanistan is trying to emerge from a history of failed regimes by emphasizing centralization, both in terms of its structures of representation and provision of services, as well as in its approach to law and justice. This top-down centralization, almost entirely through the executive, has the potential to alienate predominately rural communities who have resisted strong centralized authority for centuries. Aggressive anti-corruption programs and the

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9. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J.COMP. L. 103, 106 (2009) (Defining accountability as “maintain[ing] some level of responsiveness to society as well as a high level of professionalism and quality on the part of its members.”).

10. IFES, *supra* note 6, at 4.

11. Garoupa & Ginsberg, *supra* note 9, at 120.

12. *Id.* at 119.

outright refusal to engage with customary legal traditions alienate judges and traditional communities, respectively, cutting off possibilities for maintaining legitimacy, let alone building it. Further examination of the history of Afghanistan's legal history reveals that corruption and traditional justice are critical issues that, if properly addressed, hold the potential to establish a considerably more independent formal judiciary.

## II. TRADITIONAL V. FORMAL JUSTICE IN AFGHANISTAN

### A. *Traditional Legal Authority and Practices Vary Across Communities*

Traditional justice is a mixture of “folk Sharia,”<sup>13</sup> or popular conceptions of Islam largely influenced by Sufi orders and tribal law: “local justice mechanisms have evolved through a centuries-long process of synthesizing text-based Islamic jurisprudence and primarily-oral indigenous Afghan customary law.”<sup>14</sup> Traditional justice is generally administered through *shuras* or *jirgas*,<sup>15</sup> which are councils of tribal chiefs (*mullahs*), religious leaders (*ulema*), village elders (*maliks*), and possibly warlords, particularly in the present day in more unstable regions. “Each of these councils applies its own sophisticated and historically evolved canons of law (*adaat*) in resolving community problems.”<sup>16</sup> The administration of justice through this mix of custom and Islamic law is trusted and respected by the people, which ensures a certain level of legitimacy and rule of law in the community.

Although there are fifty-five ethnic groups in Afghanistan with distinct customs,<sup>17</sup> customary practices are studied largely in terms of

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13. J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan* 5 (Center on Democracy, Development, and the Rule of Law Working Papers No. 19, 2004), available at [http://iis-db.stanford.edu/pubs/20714/Reestablishing\\_the\\_Judiciary\\_in\\_Afghanistan.pdf](http://iis-db.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf).

14. Faiz Ahmed, *Sharia, custom, and statutory law: comparing state approaches to Islamic jurisprudence, tribal autonomy, and legal development in Afghanistan and Pakistan*, 7 GLOBAL JURIST, Mar. 6, 2007.

15. Christina Jones-Pauly & Neamat Nojumi, *Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan*, 52 AM. J. COMP. L. 836, 849-50 (2004) (“The core of the unofficial or ‘informal’ legal system is what is known in Pashtun as the local *jirga* (council), or in non-Pashtun as *shura* or *majlis*.”)

16. *Id.* at 4.

17. Amy Senier, *Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law*, AL NAKHLAH: THE FLETCHER SCHOOL ONLINE JOURNAL FOR ISSUES

their connection to Pashtunwali. The Pashtuns' code of conduct "sets the standards of acceptable behavior both within the tribes and between the tribes, and continues to dominate social relations in marriage, divorce, and property disputes and crimes."<sup>18</sup> Pashtunwali presents a number of controversies for both classic Islamic and Western legal scholars, particularly regarding child marriage, polygamy, compulsory marriage, and other rights of women granted in both Islamic and Western law.<sup>19</sup>

*Jirgas* throughout Afghanistan purport to uphold justice through Sharia law, but in fact practice a form of justice based primarily on pre-Islamic custom, rather than classic Islamic legal interpretations: "The Islam practiced in Afghanistan villages, nomad camps, and most urban areas . . . would be almost unrecognizable to a sophisticated Muslim scholar. Aside from faith in Allah and Mohammad as the Messenger of Allah, most beliefs relate to localized pre-Islamic customs."<sup>20</sup>

Islam is still a profoundly influential aspect of Afghan culture, but "Islam was super-imposed on a patriarchal society and did not seek a radical change in many of its institutions."<sup>21</sup> Islam is therefore a common cultural thread throughout Afghanistan, and further study is needed as to how different customary laws and practices have contributed to varying understandings of Islam throughout the country.

The rules of *urf* in Islamic jurisprudence incorporate customary law into the local legal system. This principle reflects the pragmatic intentions of Islamic scholars since the ninth century to adapt the religion to local practice in a way that will allow for wider adoption of the Sharia by different cultures. *Urf* refers to "recurring practices that are acceptable to people of sound nature."<sup>22</sup> In order to constitute *urf*, customary law must meet the following four conditions:

1. Custom must represent a common and recurrent phenomenon.
2. Custom must also be in existence at the time a transaction is concluded.
3. Custom must not contravene the clear stipulation of an agreement. The general rule is that contractual agreements

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RELATED TO SOUTHWEST ASIA AND ISLAMIC CIVILIZATION, at 2 (2006), available at <http://fletcher.tufts.edu/Al-Nakhlah/Archives>.

18. MOHAMMAD HASHIM KAMALI, LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY 4 (E.J. Brill: Leiden 1985).

19. *Id.*

20. Jones-Pauly & Nojumi, *supra* note 15.

21. KAMALI, *supra* note 18, at 8.

22. MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 369 (The Islamic Texts Society: Cambridge 2003).

prevail over custom, and recourse to custom is only valid in the absence of an agreement.

4. Custom must not violate the *nass*, that is, the definitive principle of the law. The opposition of custom to *nass* may either be absolute or partial. If it is the former, there is no doubt that custom must be set aside . . . if the conflict between custom and text is not absolute in that the custom opposes only certain aspects of the text, then custom is allowed to act as a limiting factor on the text.<sup>23</sup>

Furthermore, considering how many tribal traditions exist throughout Afghanistan, the rules of *urf* also allow for the distinction between general and special *urf*. Special *urf* “is prevalent in a particular locality, profession or trade . . . it is not a requirement of this type of *urf* that it be accepted by people everywhere . . . this type of *urf* is entirely ignored when it is found to be in conflict with the *nass* [legal text].”<sup>24</sup> It seems possible, therefore, for the formal justice sector to use special *urf* for parties from particular traditions, while setting aside tradition that is in conflict with the general principles of the Sharia. Unfortunately, there is no clear understanding of how and to what extent the *ulema* in different regions of Afghanistan, in light of their different customs, have developed their own scholarship on *urf*, let alone how such scholarship is used by *jirgas*.

The different leaders in traditional justice bring various interests, expertise, and authority that collectively represent the sources of popular values. However, particularly for those leaders who do not have formal education in Islamic law, “There is no organized system to determine the power and influence of the religious leaders. The absence of a centralized structure has meant that religious leadership in Afghanistan is almost wholly governed by local patterns and personal attributes of the *ulema* and *mullahs*.”<sup>25</sup> It is therefore somewhat misleading to refer to *ulema*, *mullahs*, and *maliks* as distinct classes that have uniform characteristics and qualifications. However, Kaja Borchgrevink of the International Peace Research Institute insightfully argues that as a whole, traditional religious leaders play the following roles in their communities:

1. Socialization and Social Cohesion: Strengthen internal bonds between members in a community and to act as a bridge between different groups.
2. Public Communication and Advocacy: Share information of public relevance and to spread political messages.

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23. *Id.* at 373-74.

24. *Id.* at 377.

25. KAMALI, *supra* note 18, at 6.

3. Mediation and Conflict Resolution: Because of their knowledge of religious law and general religious authority and standing in their communities, they were often involved in mediation and resolution of local conflicts.
4. Intermediation: The relative independence of the sphere in which *ulema* and local *mullahs* operate places them in a position to act as interlocutors between their own communities and external agents.
5. Resource Distribution and Social Security.<sup>26</sup>

*Mullahs* are tribal religious leaders, many of whom have long-standing tensions with the state authority because the state authority has sought to supplant them with state-selected bureaucratic and judicial officials. In part because most *mullahs* were educated inside Afghanistan,<sup>27</sup> *mullahs* are generally more familiar with their respective tribal tradition than with Islamic legal scholarship.<sup>28</sup> However, *mullahs* are well-known and respected in their communities for their Islamic authority: “The *mullahs* are closely associated with the people whom they lead in prayer and whose children they instruct in the fundamentals of Islam. They also play a significant role in marriage, birth, death, and their knowledge of Islam helps them to serve as arbiters and judges in rural areas.”<sup>29</sup>

Sufi leaders are very influential on popular notions of Islam. “Popular attachment to the [Sufi] orders and shrines is widely observable everywhere, cutting across all lines of division and identity.”<sup>30</sup> The orders’ popular appeal largely comes from oral narratives that “impart an oral history of ethics and morality.”<sup>31</sup> Furthermore, Sufi spiritual leaders, notably from the Mujaddidi family, also served as judicial authorities.<sup>32</sup> They played a major role in establishing Hanafi jurisprudence as the primary source of Islamic law for the official judicial system.<sup>33</sup>

26. PEACE RESEARCH INSTITUTE OSLO (PRIO), RELIGIOUS ACTORS AND CIVIL SOCIETY IN POST-2001 AFGHANISTAN 6 (2007), available at [http://www.cmi.no/pdf/?file=/afghanistan/doc/071212%20Religious%20Actors%20and%20Civil%20Society%20in%20Post-2001%20Afghanistan%20\\_Paper.pdf](http://www.cmi.no/pdf/?file=/afghanistan/doc/071212%20Religious%20Actors%20and%20Civil%20Society%20in%20Post-2001%20Afghanistan%20_Paper.pdf).

27. *Id.* at 34.

28. OLIVIER ROY, ISLAM AND RESISTANCE IN AFGHANISTAN 4 (Cambridge University Press: New York 1990).

29. KAMALI, *supra* note 18, at 7.

30. Jones-Pauly & Nojumi, *supra* note 15, at 847.

31. *Id.* at 846.

32. *Id.* at 848.

33. *Id.* (Although a significant number of Sufi leaders were killed in the war against the Soviets and subsequently by the Taliban, Sufism remains an important source of



The *ulema* are traditionally considered higher-level religious clergy who “generally hold higher religious degrees from madrasas and Islamic universities in Afghanistan and abroad.”<sup>34</sup> Opinion varies as to how much the *ulema* are connected to and understand traditional justice, and Afghan *ulema* today likely come from a range of education levels. Some *ulema* are considered to be “closer both to the Afghan (non-Islamist) intelligentsia and the state”<sup>35</sup> and are more likely to share the intelligentsia’s frustrations with customary practices. However, more provincial *ulema*, because of their authority in local communities,<sup>36</sup> resist the state and see those who cooperate with the state, particularly by serving on the national *Shura e Ulema* (Council of Islamic Scholars), as “political opportunists.”<sup>37</sup> Because thirty years of conflict has prevented a whole generation of rural Afghan *ulema* from accessing advanced education,<sup>38</sup> this attitude likely makes up a substantial portion of Afghan *ulema*.

However, there are some *ulema* who “are supportive of neither the current Afghan government nor the Taliban.”<sup>39</sup> These *ulema* are uniquely positioned to forge alliances with the state using their knowledge of Islamic approaches to customary law. *Ulema* are trained in and have experience “consider[ing] and evaluat[ing] local customs in deriving the substantive laws for a community on any given issue.”<sup>40</sup> In light of the pluralist nature of Afghan traditional justice, these *ulema* are in a strong position to address questions of how to evaluate customs according to the *urf* doctrine. The challenge with empowering these *ulema* is that they are decreasing in number, as they are targeted by both

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Islamic tradition for ordinary people).

34. PRIO, *supra* note 26, at 27.

35. *Id.* at 33.

36. Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 ME. L. REV. 347, 365 (2008). After the downfall of the Soviet central government, *ulema* who used to be judges in the formal system began to “create an autonomous legal system employing *sharia* law but outside of a formal state structure. In some respects this was a return to pre-modern Islamic legal practices in which judges were largely independent of the state because law was derived from religion. . .”; *Id.* at 364-65. In communities that were controlled by warlord commanders, these *ulema* had enough authority that their presence “often served the useful purpose of restraining military commanders from taking arbitrary actions that would benefit themselves and their relatives.”

37. PRIO, *supra* note 26, at 7.

38. Barfield, *supra* note 36, at 364.

39. PRIO, *supra* note 26, at 8.

40. Ahmed, *supra* note 14, at 24.

the government and the Taliban for appearing to support the other side.<sup>41</sup>

The different loci of customary and modern legal authority show that popular perceptions of justice depend upon legal authority outside of intellectualized Islam. In the non-custom based system, people are used to deferring to the knowledge of the person who pronounces the judgment; however, in customary law, “it is not only the adjudicators who guard the understanding of the rules, but also the participants, i.e., the parties, the witnesses, and the public audience.”<sup>42</sup> If the foundational legitimacy of the customary system is based on collective understanding, the formal system will not increase its own legitimacy unless the rules it applies are accessible to the majority of the population. This paper will later show that in light of the prominence of customary law and Sufi traditions for ordinary people, the formal system cannot ignore these perspectives if it seeks to garner their support.

*B. Afghan Society Exists at the Community Level and Consistently Resists Centralized State Authority*

Afghanistan has yet to attain the national identity and common interest necessary to sustain a state. Barnett Rubin explains that, “For most people in Afghanistan the state remains not the trustee of their common interest, but another particular interest like a tribe or clan.”<sup>43</sup> Indeed, the state came into formation through tribal federation under the leadership of Ahmad Shah Durrani, a Pashtun tribal chief, in 1747.<sup>44</sup> This tribal formation was called the *loya jirga* (great council) and was formed not on the basis of a common national spirit, but rather on some recognized common values.<sup>45</sup>

One’s ethnic identity was less important than the values upheld in one’s community. In this way, it was not enough to simply be an Afghan – true Afghan identity must come from upholding and protecting the basic values held by the people. This sense of identity still holds true

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41. PRIO, *supra* note 26, at 8. “*Mullahs and ulema* who are supportive of neither the current Afghan government nor the Taliban are attacked by both militant Islamic groups and the government. Precisely because many of these ‘middle-grounders’ are seen as influential in their communities by both secular and religious actors, they have found themselves in a precarious position.”

42. Jones-Pauly & Nojumi, *supra* note 15, at 851.

43. Barnett R. Rubin, *Lineages of the State in Afghanistan*, 28 ASIAN SURVEY 1189 (1988).

44. *Id.* at 1191.

45. ROY, *supra* note 28, at 13.

today,<sup>46</sup> meaning that a stable Afghan state must reflect these values. The challenge with this imperative is that basic Afghan values, while professed in the name of Islam, are highly contested and vary from one community to the next.<sup>47</sup>

The traditional *jirga*, *shura* or *maraka*<sup>48</sup> emphasize restorative justice as a way towards reconciliation, a value very different from the retributive justice pursued in modern Western courts.<sup>49</sup> Parties voluntarily participate in proceedings, which take place in a mosque or the home of a community leader. The *jirga* is informal, “not a fixed local organization with regular meetings, official membership, a budget, or a recognized system of recording and reporting.”<sup>50</sup> It is therefore difficult to pinpoint the status of justice administered through *jirgas*, and elite urban intellectuals involved in setting the judicial policies of the formal sector do not have a nuanced understanding of the cohesion underlying traditional *jirgas* in each region.

Rural traditional communities are largely ambivalent towards the state, which does not sufficiently embody traditional values and practices.<sup>51</sup> Further, when faced with state attempts to penetrate traditional practices, ambivalence turns to resistance and rebellion. For instance, under the reign of Amir Amanullah (1919-1929), the state

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46. See Rubin, *supra* note 43, at 1193. Traditional values and practices have persisted in part because of Afghanistan’s history as a buffer state between British colonial territory and Russia. Although Afghanistan was never a formal British colony, Britain controlled its foreign affairs for much of the mid-nineteenth century, isolating it from the usual ideological and governmental effects of colonialism. Furthermore, because the Amir was subsidized by the British to maintain the Afghan armies, Afghanistan was also largely isolated from the values and practices of capitalism.

47. INTERNATIONAL LEGAL FOUNDATION, THE CUSTOMARY LAWS OF AFGHANISTAN (Sep. 2004), available at [http://www.usip.org/files/file/ilf\\_customary\\_law\\_afghanistan.pdf](http://www.usip.org/files/file/ilf_customary_law_afghanistan.pdf). The International Legal Foundation’s 2004 study of customary traditions throughout each of Afghanistan’s regions demonstrates that there is a wide range of practices, some of which directly oppose each other. For example, the Pashtuns of the South and East traditionally give women to the victim’s family in the aftermath of a murder, but Hazaras in the Central Region of Hazarajat, as well as the tribes in Nuristan, condemn this practice.

48. The differences between these three traditional structures in Afghanistan are described in Ali Wardak, *supra* note 1, at n.1-2. Wardak notes that while these terms often are blurred and used interchangeably in Afghanistan, *shuras* tend to be ad hoc conferences, while *jirgas* and *marakas* are more permanent groups that deal with majority (including criminal) and minor civil disputes, respectively.

49. Jones-Pauly & Nojumi, *supra* note 15, at 838.

50. *Id.* at 836.

51. ROY, *supra* note 28, at 10.

imposed a cultural revolution to centralize power and modernize education (injecting concepts from Western enlightenment). These reforms, known as the Nizamiya laws, that were laid down by Amir Abdur Rahman at the turn of the twentieth century to create a uniform system of social administration.<sup>52</sup> However, it was under Amanullah, who sought to follow the staunchly secular reforms taking place under Kemal Ataturk in Turkey, that reforms of the administration of justice alienated traditional authorities. Amanullah systematically removed from the village assemblies all their authority, and deprived *qadis* (judges) who were not appointed by the government the right to make judgments.”<sup>53</sup> This act of stripping traditional judges of their power alienated tribal leaders, and Amanullah was forced by resistance and rebellion to flee to Italy.<sup>54</sup> Although a combination of factors likely led to the rebellion against Amanullah, archival research reveals that the main motive for the revolt was “to curtail the loss of their [the *qadis*] authority to the central regime.”<sup>55</sup> In fact, the rebellion in Khost was led by the *ulema* (religious scholars), “and their official complaint was that the new laws of the country did not conform to the Sharia.”<sup>56</sup> Christina Jones-Pauly insightfully argues that Amanullah’s agenda failed because it was a top-down effort to force social change, a process she terms “internal colonization.”<sup>57</sup>

The Constitution of 1930<sup>58</sup> was the first real modernization of the legal system. These reforms looked to Western standards on matters of administrative, commercial, and procedural law.<sup>59</sup> Intellectuals “who had no formal training in Islamic studies reorganized the Islamic law in modern form by grouping the old materials in new chapters and articles which would facilitate the finding of specific rules and provide internal consistency.”<sup>60</sup> Carrying out this reorganization, without seeking input

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52. *Id.* at 15.

53. *Id.* at 19.

54. Rubin, *supra* note 43, at 1199.

55. United States Institute of Peace (USIP), *Historical Relationship between State and Non-State Judicial Sectors in Afghanistan* 11 (Oct. 8, 2006), available at [http://www.usip.org/files/file/tarzi\\_paper.pdf](http://www.usip.org/files/file/tarzi_paper.pdf).

56. *Id.*

57. Jones-Pauly & Nojumi, *supra* note 15, at 829.

58. Ratified under Nader Shah after the tribal wars following the exile of Amanullah.

59. A.S. Sirat, *The Modern Legal System of Afghanistan*, 16 AM. J. COMP. L. 563 (1968).

60. *Id.*

from traditional legal authorities, caused problems that still plague Afghanistan's judiciary. Although it purports to issue decisions according to Islamic law, its *Tamasok al Qudat* (instruction book for judges, created at the time of the 1930 Constitution) lacks legitimacy in the minds of the leaders who maintained systems of justice in Afghanistan for centuries.<sup>61</sup>

Under the People's Democratic Party of Afghanistan (PDPA), the Communist regime that came to power in 1978, traditional authority was not only ignored but also suppressed. The PDPA established a "Revolutionary Council" that attempted "to dissolve the autonomy of the Afghan legal system and to establish a single system under the total control of the national government."<sup>62</sup> Just as the Nizamiya reforms under Abdur Rahman and Amanullah sought to build a secular modern state, the PDPA justice system was "overtly secular."<sup>63</sup> Just as the Nizamiya reforms led to rebellion and rejection of the state, the Revolutionary Council produced a similar effect.<sup>64</sup> In an effort to maintain popular support after the Soviet invasion in 1979, the PDPA retreated to the old "conformity with Islam formula."<sup>65</sup> However, the Soviet invasion overwhelmed any and all gestures made by the PDPA, and the resistance against the Soviets escalated into what became known as the Afghan Jihad.

The Taliban successfully avoided a top-down imposition of "foreign legal values."<sup>66</sup> Initially, the Taliban asserted its own top-down agenda for the administration of justice according to Arab Salafism, rather than formal Sharia. However, in practice, the Taliban were not people trained in madrasas that used Arabic. What was implemented was Arab Salafism as well as strict Pashtunwali."<sup>67</sup>

Throughout modern Afghan history, the Afghan state has attempted to bring its power from the periphery to the center,<sup>68</sup> but power always has rested fundamentally with local power holders. Alexander Thier

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61. Rubin, *supra* note 43, at 1200. The 1930 Constitution did give traditional Islamic leaders a role in reviewing legislation and gave tribal chiefs representative roles in government, but these roles were outside the administration of justice.

62. Jones-Pauly & Nojumi, *supra* note 15, at 834.

63. Barfield, *supra* note 36, at 353.

64. Jones-Pauly & Nojumi, *supra* note 15, at 834.

65. Barfield, *supra* note 36, at 353.

66. *Id.* at 367.

67. *Id.*

68. ROY, *supra* note 28, at 14.

notes that:

“Afghanistan has almost always operated through a negotiation between the central authority and local power-holders – and tensions between these two levels have existed for as long as there has been a state. Even the Taliban, which exerted a greater measure of central control than its immediate predecessors, was forced to negotiate with local elites and accept a degree of local autonomy.”<sup>69</sup>

In light of this continuous power negotiation between the state and local power holders, major barriers exist for future coordination between the state and local, traditional institutions. Historically, local leaders have tended to keep state officials unaware of the true nature of their traditional practices, resentful of the state’s attempts to insert its bureaucratic agenda into traditional structures and practices that have evolved over centuries. Therefore, part of the explanation for the Taliban’s ability to maintain its grip over localities, in addition to its use of force, is its appropriation of local governance traditions—perhaps not intentionally at the outset—through rhetoric that appeals to the kind of Islamic justice with which communities are familiar.

In sum, a major portion of today’s Afghans understand the proper administration of justice through both traditional and Islamic lenses. The downfalls of Amir Amanullah and the PDPA regime demonstrate that a top-down approach to reforming the administration of justice can trigger destabilization and violence. The above historical analysis indicates that traditional authorities and practices play a major role in the lives of ordinary people and impact their attitudes towards the state. The following section discusses current dynamics of instability, particularly in terms of the current administration of justice.

### III. IMPACT OF CIVIL WAR ON ADMINISTRATION OF SOCIAL JUSTICE

This section examines the distribution of authority after the overthrow of the Taliban in 2001, the impact of thirty years of conflict on both the formal and traditional justice systems, and the limits of the traditional system in meeting conflict-related needs of communities.

After Taliban rule was disrupted in 2001, “an array of factions and local leadership structures reassumed control of the countryside. Several of these factions . . . relied on long-standing organizational structures and

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69. Faiz Ahmed, *Afghanistan’s Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic*, 10 GONZ. J. INT’L L. 269, 288 (2007).

foreign support to retake their previous domains.”<sup>70</sup> Because Western strategy focused on removing the Taliban, there was (and perhaps still is) a willingness to support these factions, despite the negative impact it has on the consolidation of state authority. Particularly in the Pashtun areas of Southern and Eastern Afghanistan, the local *jirga* often have evolved into shared authority between tribal leaders and local commanders.

Since 2001, the Taliban has sought to weaken and dismantle the Karzai administration and other warlords have also sought to maintain power in their domains. Oral evidence indicates that the Taliban’s local authorities interfere with courts to appropriate them for their own purposes<sup>71</sup> and maintain their own hegemony. Warlords have also sought to maintain power by participating in a *jirga*, whether or not they were requested; traditionally, disputants request the presence of certain community leaders in a *jirga*.<sup>72</sup>

Although the Taliban and warlords’ appropriation of judicial authority has yet to be researched in detail,<sup>73</sup> changing social and power relations indicate that leadership based on armed strength and party affiliation has begun to crowd out traditional authority and practices.<sup>74</sup> Taliban leaders and warlords may apply extremist ideology to dispute resolution, departing from both tribal law and “folk Sharia.”<sup>75</sup>

Even beyond this appropriation of judicial authority, the conflict has damaged the integrity of the traditional justice system by generating a class of undereducated religious leaders and pressuring the system to hear disputes that it had never managed before. In non-Pashtun areas that did not have a strong tradition of village councils, communities created new *shuras* to fill the vacuum in the absence of a state system.<sup>76</sup> In these areas, such ad hoc arrangements do not have a long-standing basis of authority to ensure their effectiveness. The ad hoc nature of these

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70. Thier, *supra* note 13, at 4. These factions notably included the Jamiat-i-Islami (led by Former President Rabbani and Ishmael Khan), the Shura-i-Nizar (led by Ahmed Shah Masood), Hezb-i-Wahadat (led by Karim Khalili), and Jumbish-i-Milli (led by General Dostum).

71. Jones-Pauly & Nojumi, *supra* note 15, at 835.

72. *Id.* at 836.

73. United States Institute of Peace (USIP), *Establishing the Rule of Law in Afghanistan* (Mar. 2004), available at <http://www.usip.org/files/resources/sr117.pdf>.

74. United States Institute of Peace (USIP), *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* (Nov. 2006), available at [http://www.usip.org/files/file/clash\\_two\\_goods.pdf](http://www.usip.org/files/file/clash_two_goods.pdf).

75. Thier, *supra* note 13, at 5.

76. Barfield, *supra* note 36, at 363.

councils, perhaps combined with lacking education among these leaders, have led to instances of bribery, even in the absence of warlords: “[Local traditional leaders] acted as self-appointed arbitrators to resolve a problem without resort to formal adjudication. Unfortunately this was often done by demanding bribes to make a problem disappear.”<sup>77</sup> Because these ad hoc structures provided the only efficient and timely justice, communities continued to rely on them.

Conflict-related needs can be beyond the capabilities of both ad hoc and relatively established informal justice, but in the absence of a cooperative relationship with the new state justice system, the informal system is obliged to hear these disputes. Land disputes are very often handled unfairly when local strongmen have usurped the process.<sup>78</sup> Furthermore, traditional justice has not “proven able to deal with larger scale atrocities related to the armed conflict of the past 25 years,” due to its limitations in mediating intergroup conflict and the magnitude of atrocities.<sup>79</sup> In some places, traditional authorities sometimes refer cases to the formal system where the matter is “beyond their competence,”<sup>80</sup> although they do not do so in areas dominated by warlords or the Taliban. Such ad hoc referrals should be streamlined so as to ensure that all disputes have a forum for resolution or adjudication.

Decades of conflict have also led to confusion over applicable laws in the formal justice system. “The discontinuity of regimes over the last quarter century has resulted in a patchwork of differing and overlapping laws, elements of different types of legal systems, and an incoherent collection of law enforcement and military structures.”<sup>81</sup> Without a standardized application of law in the formal justice system, coordination with the informal system will remain ad hoc and therefore unable to properly assess needs and explore referral policy options.

As explained in the next section, the formal system struggles with corruption and limited training, due in large part to blunders in planning international assistance. In this way, “the post-Taliban justice system

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77. *Id.* at 361.

78. Barfield, *supra* note 36, at 3.

79. *Id.* at 16.

80. United States Agency for International Development (USAID), *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies* 15 (Apr. 2005), available at [http://pdf.usaid.gov/pdf\\_docs/PNADF590.pdf](http://pdf.usaid.gov/pdf_docs/PNADF590.pdf).

81. USIP, *supra* note 73, at 3.



remains a shambolic array of dysfunctional courts, ad hoc elder's councils, and rule by local strongmen.<sup>82</sup> Neither the formal or informal system functions as intended.

Because the current administration of justice in Afghanistan is highly unstable, a top-down approach to judicial reform has the potential to trigger further instability and resistance against the state. Although traditional justice structures have atrophied or been co-opted by strongmen, the history of distrust between the state and society makes people reluctant to prefer state authority. If ordinary people, guided by their traditional leaders, come to prefer local strongmen to the state, then the state's efforts to impose reforms from the top-down will likely fail. However, the government's engagement with traditional justice could prevent such resistance.

#### IV. BUILDING JUDICIAL INDEPENDENCE IN AFGHANISTAN: PROCESS AND OUTCOME

##### *A. Introduction*

This section focuses on the shortcomings of judicial reforms since 2001, a continuation of the trend of top-down reform that started with Abdul Rahman. First, although the Constitution is largely ambiguous on issues of customary law and practices, judicial reforms reject the traditional system outright. Second, the reforms channel all judicial career matters through the Supreme Court rather than through a separate judicial council, which undermines judicial independence. Third, implementation problems limit the reforms' effectiveness. These shortcomings all contribute to low levels of usage and popular confidence in the formal justice system, and lead to heightened instability and propensity for violence in present-day Afghanistan.

##### *B. Overall Rejection of Traditional Justice*

The formal justice sector tends to hold negative attitudes towards traditional justice, due in part to limited knowledge of traditional practices.<sup>83</sup> Afghanistan's recent history of codification by decree demonstrates that the state priority since the mid-1960s has been to develop a coherent and comprehensive system of laws, to be implemented in a top-down manner. Since the mid-1960s, "new

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82. Barfield, *supra* note 36, at 3.

83. USAID, *supra* note 80, at 12.

comprehensive codes of criminal law, criminal procedure, [and] civil law were passed, as well as laws pertaining to civil servants, taxation, and investment.”<sup>84</sup>

Much of the formal sector resents the informal sector, which symbolizes resistance to modernization. Rather than the heavily customized Islam applied by the *jirgas*, the formal sector applies a highly intellectualized version of Islamic law. As early as 1949, the elites—which make up a large portion of today’s government officials and judges—produced publications, some of which were banned, expressing frustration over the “ignorance” of the people.<sup>85</sup> Furthermore, the 2004 Constitution (Article 122) specifically disallows cases from falling automatically into the jurisdiction of a traditional *jirga* (thereby bypassing state courts).<sup>86</sup>

Negative perceptions of traditional Afghan customs fuel the formal sector’s stance against the application of customary law. First, the formal sector mistakenly perceives traditional justice as operating in a feudal system. However, power traditionally transfers through networks of patronage, and individuals do not necessarily remain in given positions for life.<sup>87</sup> The authority of village chiefs, including the authority to dispense justice, comes from the consent of the community (*qawm*). They remain in their role as religious leaders for life, but this is because they are revered by the community and are not focused on political power.

Despite the formal sector’s negative attitudes towards traditional justice, judges in formal courts routinely hand off cases to the traditional system.<sup>88</sup> Judges in the Supreme Court feel that this reduces their workload to a more manageable level.<sup>89</sup> Caseloads of the formal courts

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84. Thier, *supra* note 13, at 6.

85. Rubin, *supra* note 43, at 1205.

86. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, Jan. 26, 2004, art. 122. “No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority.”

87. ROY, *supra* note 28, at 22. These traditional power relationships might be compromised in areas that are strongholds for warlords, but the underlying customary system is not fundamentally feudal. The major exception is the suppression of women, but rejecting customary laws altogether on this basis compromises the legitimacy and level of rule of law necessary to pursue better protection of women’s rights.

88. USAID, *supra* note 80, at 11.

89. Barfield, *supra* note 36, at 369.

are much smaller than in the informal system,<sup>90</sup> raising the question as to how this practice of referral is consistent with the overwhelming evidence of negative attitudes towards customary law.

Judges from the formal system may still share certain traditional points of view with the traditional system and feel comfortable referring certain matters to it. Particularly regarding family disputes, the tradition throughout Afghanistan, including in urban centers, is for family matters to be handled privately, which is more feasible in the traditional system.<sup>91</sup> Domestic violence is sometimes handled in formal courts, but the low number of female judges in the formal system makes formal courts less appealing.<sup>92</sup>

Despite examples of referral between the systems, coordination is one-sided and the formal system does not solicit input from traditional leaders. Moreover, traditional religious leaders are being instrumentalized—if not co-opted—for the legitimacy they hold in their communities.<sup>93</sup> This type of relationship is not sustainable: the practice of referring cases to the informal system may seem to endorse traditional authority, but it is only intended to be temporary. It does not reflect the attitudes and long-term intentions of the formal justice institutions, namely to centralize their authority.

### *C. Constitutional and Administrative Models for Judicial Reform*

Article 125 of the 2004 Constitution provides that the Supreme Court will prepare and implement the judiciary's budget and establish an "Office of General Administration of the Judiciary." All career matters are centralized under the Supreme Court.<sup>94</sup> Therefore, the President

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90. USAID, *supra* note 80, at 12.

91. *Id.* at 15.

92. *Id.* at 33. Formal courts in parts of Herat province handle domestic violence cases.

93. PRIO, *supra* note 26, at 7. "The relationship between religious leaders, the government and other development actors seems to go in one direction only. Government and other development actors seek to use the voice of the clergy to legitimize their policies and programs, and to gain access to project beneficiaries. However, little effort goes into either creating space for an autonomous role on the part of religious actors or establishing genuine dialogue."

94. INT'L CRISIS GROUP, ASIA REPORT NO. 45 – AFGHANISTAN: JUDICIAL REFORM AND TRANSITIONAL JUSTICE 7 (2003). Rather than having a judicial council that is a separate institution from the judiciary itself, the Supreme Court itself is the "Supreme Council of the Judiciary." *Id.* "The highest court, composed of nine constitutionally-mandated justices, is the managerial body for the court system, also known as the

appoints and approves Supreme Court Justices and Parliament (*Wolesi Jirga*). The Supreme Court recommends lower level judicial appointments, which the President approves.<sup>95</sup> Under the Law on the Organization and Authority of the Courts, the Chief Justice of the Supreme Court personally proposes action to the President on all disciplinary issues concerning individual judges.<sup>96</sup>

Article 116 of the Constitution states that the judiciary is an “independent organ of the state,” meaning that inappropriate political influence on the judiciary is unconstitutional. This model is precarious in an unstable, post-conflict context because there is no buffer between the Supreme Court and political interests concerning judicial career decisions.

The current Constitution is ambiguous on the roles of both Islam and customary law in the formal justice system. Article 130 states that the courts are to apply Hanafi jurisprudence when there is a gap in the Constitution and statutory law, and “within the limits set by this Constitution, rule in a way that attains justice in the best manner.” However, no further guidance is given defining general concepts of justice.<sup>97</sup> Furthermore, the Constitution only addresses customary law regarding women, providing that the state is obligated to rule against “traditions contrary to the provisions of the sacred religion of Islam.”<sup>98</sup> The Constitution does not provide guidance for determining whether a particular tradition is anti-Islamic.<sup>99</sup> In sum, although judges are not

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Supreme Council of the Judiciary. This body has very few judicial responsibilities, for example deciding questions of jurisdiction, venue, extradition, impeachment, and the constitutionality of laws. Actual appellate review of most cases before the court is conducted by the relevant diwan, or bench, on the Supreme Court. These benches, also referred to as the courts of cassation, are headed by one of the Supreme Court Justices, and peopled with at least four other judges.” See 2004 CONSTITUTION, *supra* note 87, art. 132: “Appointment, transfer, promotion, punishment, and proposals for the retirement of judges, carried out according to law, shall be within the authority of the Supreme Court.”

95. INT’L DEVELOPMENT LAW ORGANIZATION (IDLO), EVALUATION REPORT (2008), available at <http://www.idlo.int/DOCNews/277DOC1.pdf>.

96. Supreme Court of the Islamic Republic of Afghanistan, *Law on the Organization and Authority of the Courts of the Islamic Republic of Afghanistan*, (Apr. 18, 2005).

97. Jones-Pauly & Nojumi, *supra* note 15, at 844.

98. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, Jan. 26, 2004, art. 54. “Family is the fundamental pillar of the society, and shall be protected by the state. The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.”

99. Jones-Pauly & Nojumi, *supra* note 15, at 845.

required to have background in both secular and Islamic jurisprudence,<sup>100</sup> let alone customary “folk Sharia,”<sup>101</sup> they have unlimited Constitutional authority to adopt their own interpretation of Hanafi principles and whether traditional practices are Islamic.

Furthermore, the Constitution does not provide any sort of “Supremacy Clause” to instruct courts on how to uphold classic Hanafi law while simultaneously applying statutory law. “Whereas the religious law, or at least a part thereof, claims permanent validity, secular law is subject to the dictates of rationality and of changing social conditions, hence replacing one statute by another.”<sup>102</sup> Without Constitutional guidance on this potential tension, judges are within the bounds of the Constitution for choosing to uphold their personal interpretation of “classic Hanafi law” over a recently enacted statute.

In addition to lacking Constitutional protections for predictable and transparent judicial decision making, early plans for judicial policy were sparse and imprecise. In 2005, the Ministry of Justice conducted a needs assessment which identified engagement with traditional justice as a strategic priority.<sup>103</sup> The assessment estimated that ninety percent of Afghans rely on traditional justice, and that “this is partly a reflection of trust and confidence in local communities and the justice they give, and partly a question of the physical absence and low capacity of state institutions.”<sup>104</sup> However, the Ministry’s strategy for engagement is one of top-down training, in order “to eliminate [the traditional justice system’s] unacceptable elements and maximize its positive features. The aim should be to improve the quality of traditional justice, perhaps offering training to elders and others, incentives to follow the best approaches, and linkages to the state system where agreed procedures are followed.”<sup>105</sup> Although the quality of traditional justice has perhaps strayed from what it once was, this strategy aggressively imposes authority, a strategy that has repeatedly failed throughout Afghanistan’s

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100. See Supreme Court, *supra* note 97, at art. 58(1): “On the recommendation of the Supreme Court and with approval of the president, any qualified person meeting following requirements shall be appointed as a [lower court] judge . . . Hold the BA degree from any faculties of law or Sharia or above it or holds diploma on Religious Studies from an officially recognized center or equivalent.”

101. Jones-Pauly & Nojumi, *supra* note 15, at 855.

102. KAMALI, *supra* note 18, at 46.

103. See Ministry of Justice of the Islamic Republic of Afghanistan, *Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan* 12 (May 2005).

104. *Id.*

105. *Id.*

history. Requiring such training, without consulting traditional leaders in the process, will likely alienate the traditional leaders in many parts of the country and possibly fuel further resistance.

*D. Implementation: Consequences of an Ambiguous and Contradictory Model for Individual Judicial Independence*

Without a buffer between the Supreme Court's authority and the urgent and unstable needs of the executive, judicial career decisions have succumbed to post-conflict instability. Judicial appointments in Afghanistan "are marred with political manipulations and biases, including pressure from armed groups and warlords."<sup>106</sup> Even in the absence of such pressure, appointments are "routinely made on the basis of personal or political connections without regard to legal training or other qualifications."<sup>107</sup>

The result is that judges may not be qualified. At least one source has asserted that only twenty percent of Afghanistan's judges are sufficiently qualified.<sup>108</sup> In 2004, the United Nations Assistance Mission in Afghanistan (UNAMA) found that only one-third of judges and prosecutors had university-level education.<sup>109</sup> This affects not only the political independence of the judiciary, but also the competence of individual judges to refrain from corrupt practices.

Political influence on the Supreme Court has also impacted the evaluation and discipline of judges. Processes for evaluating and disciplining corruption are not transparent to the public or to the judges themselves. In addition, due to a lack of resources, the court has "no effective capacity to detect, investigate and prosecute cases of judicial misconduct."<sup>110</sup> Most fundamentally, there is no independent judicial council to handle these decisions in a setting designed to represent a balance between independence and accountability. Therefore, because the Supreme Court is acting both as a court and as a judicial council, its independence is compromised by political influences and its decisions lack accountability.

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106. TRANSPARENCY INTERNATIONAL, TACKLING JUDICIAL CORRUPTION IN AFGHANISTAN 3 (Sept. 12, 2007), *available at* [www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query146.pdf](http://www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query146.pdf).

107. USIP, *supra* note 73.

108. *Id.*

109. IDLO, *supra* note 95, at 17-18.

110. *Id.* at 19.

Furthermore, the creation of the Supreme Court exploited the Constitution's lack of a supremacy clause and virtually ignored the new Constitution. In 2007, Parliament rejected Karzai's re-nomination of Chief Justice Fazel Hady Shinwari<sup>111</sup> because he refused to uphold the new constitution.<sup>112</sup> At Shinwari's insistence, the Supreme Court had "appointed scores of non-university trained Muslim clerics to all levels of the court system."<sup>113</sup> Shinwari openly ignored the Constitution's prescriptions for the make-up of the judiciary by adding extra judges to serve on the Supreme Court and by issuing rulings that had no basis in law.<sup>114</sup> Shinwari also used the *Shura e Ulema*, the official council of Islamic scholars, as an alternate channel for issuing rulings on questions of Islamic law.<sup>115</sup>

The new Supreme Court that took the bench after parliamentary approval in 2007, headed by Chief Justice Abdul Salam Azimi, reflected a change from "Taliban sympathizers" to "more state oriented technocrats."<sup>116</sup> Although the current Supreme Court is considerably more deferential to the Constitution, it remains unclear whether judicial appointments are made strictly according to the qualifications outlined in the Constitution, or whether career process decisions are made under political influence.

#### *E. Implementation: The Judicial Commission and Judicial Reform Commission*

In May 2002, President Karzai created by decree a sixteen-member Judicial Commission to initiate institution-building in Afghanistan.<sup>117</sup> The international community and the Karzai administration instructed the

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111. Thier, *supra* note 13, at 7. Shinwari was "the former head of a *madrassa* in Peshawar, and an ally of the Saudi-backed fundamentalist militia leader Abdur Rassool Sayyaf."

112. See Eurasianet, *Afghanistan: Division Between Islamist, Moderates Hampers Effort on New Constitution* (2003), available at <http://www.eurasianet.org/departments/insight/articles/pp020103a.shtml>.

113. Thier, *supra* note 13, at 7.

114. *Id.* at 1. For example, "Only ten days after the close of Afghanistan's Constitutional Convention . . . Without any case before the court, and based on no existing law, the court declared on January 14, 2004 that a performance by the Afghan pop singer Salma on Kabul television was un-Islamic and therefore illegal."

115. USIP, *supra* note 73, at 7. (Members of the *shura e ulema* shared Shinwari's points of view.)

116. Barfield, *supra* note 36, at 369.

117. Thier, *supra* note 13, at 8.

Judicial Commission to “rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.”<sup>118</sup> The Judicial Commission dissolved four months after its establishment. “Political tension among members, the lack of a clear agenda and the impression of undue conservatism among some in the [Afghan Transitional Authority] seem to be the main reasons for the dissolution of this body.”<sup>119</sup>

In November 2002, President Karzai again established by decree a new commission, renamed the Judicial Reform Commission (JRC). The JRC’s membership was to be less politically partisan than the previous Commission and more reflective of the professional legal community, containing “three former Supreme Court Justices, one former Minister of Justice, two former Attorney’s General, and four law professors.”<sup>120</sup> The JRC’s primary act was its creation of a “Master Plan” in January 2003. After consulting with all actors in the justice sector, the JRC proposed a Master Plan, laying out thirty projects to be achieved in eighteen months, falling into four categories: Law Reform; Surveys, Physical Infrastructure, and Training; Legal Education and Awareness; the Structure of Judicial Institutions.”<sup>121</sup>

Although the JRC Master Plan appeared impressively comprehensive, the Presidential decree creating the JRC was unclear about the Commission’s role in relationship to other formal justice sector institutions.<sup>122</sup> Consequently, the JRC was unable to take a leadership role in “setting the agenda or facilitat[ing] support for the priorities” of the Supreme Court and Ministry of Justice.<sup>123</sup> Furthermore, despite the JRC’s Master Plan to do projects on “Law Reform,” President Karzai fundamentally undercut the JRC by underfunding it<sup>124</sup> and entrusting the

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118. INT’L CRISIS GROUP, *supra* note 94, at 7.

119. Thier, *supra* note 13, at 8. In particular, the different institutions that held prominent membership on the Judicial Commission competed for power, and this contest resulted in the politicization and ineffectiveness of the sector as a whole. “There was reportedly strong competition and recrimination between the Ministry of Justice and the Supreme Court, as both wanted to control the appointment of judges, and the Ministry of Justice wanted to control the Attorney General’s Office. As a result of the heavy involvement of these two entities, the Commission was reportedly not sufficiently independent of the government to be effective.”

120. *Id.*

121. *Id.* at 12.

122. USIP, *supra* note 73, at 6.

123. *Id.*

124. Thier, *supra* note 13, at 12.



Ministry of Justice alone to “determine which laws were valid” insofar as they “are not inconsistent with [the Bonn Agreement] or with international legal obligations.”<sup>125</sup>

Despite its comprehensive plan, and in addition to the lack of cooperation with the formal sector institutions, the JRC failed to consult the public and “was accused of being too fundamentalist, too liberal, of being composed only of Afghans living abroad, or being controlled by one ethnic group or another.”<sup>126</sup> Although the JRC had more representative membership than its predecessor, the Commissioners “lacked modern management skills, and . . . they all possessed a typical Kabul-centric view of Afghanistan.”<sup>127</sup> This “Kabul-centric” stance reflected the general tendency to adopt a top-down approach that ignored public opinion.

Factionalism pervaded the JRC and, combined with pre-existing divisions in and among the permanent institutions, prevented it from establishing leadership in the justice sector.<sup>128</sup> The JRC demonstrated its lack of capacity to lead the permanent institutions through its overall “complacency about the structure of the judiciary and its implementation of the law.”<sup>129</sup> Barfield argued this complacency demonstrated that the JRC was unequipped to consider real issues of reform:

They all defined reconstruction as bringing back the same three-tiered court structure (district, province, capital) that existed in the country for most of the twentieth century *without examining whether this model still served the country’s needs*. More confounding was their common insistence that (a) the system was already completely up and running, (b) that its size was adequate for handling all of Afghanistan’s legal problems, and (c) that the formal system alone was all that was needed.<sup>130</sup>

In light of these major misconceptions and attitudinal barriers, there are certainly questions as to why international advisors to the Commission did not seek to direct the JRC’s attention to important issues in a supportive manner. Nevertheless, factionalism among the permanent

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125. Barfield, *supra* note 36, at 19.

126. Thier, *supra* note 13, at 8.

127. *Id.*

128. USIP, *supra* note 73, at 6. Factionalism among the permanent institutions was caused in part by the equal legal status of the Ministry of Justice, the Supreme Court, and the Attorney General’s Office, as well as by “a variety of political, personality, and *wrf*-consciousness reasons.”

129. Barfield, *supra* note 36, at 369.

130. *Id.* (emphasis added).

institutions, combined with insufficient funding and political support, would have still presented major obstacles to the JRC's realization of its Master Plan.

*F. Implementation: Problems with Bribery and Physical Intimidation*

Corruption is pervasive in Afghanistan's formal justice system. Integrity Watch Afghanistan found that in 2007, half of their survey respondents had paid bribes to government officials.<sup>131</sup> Furthermore, 74% of respondents perceived the judiciary as the "sector where corruption increased the most."<sup>132</sup>

The sensitive nature of bribery has limited the compilation of concrete data regarding the frequency and magnitude of bribes in the judiciary. However, Transparency International's U4 Anti-Corruption Resource Center found:

Judges reportedly ask defendants for money; judges and prosecutors routinely accept bribes for not processing cases. Disappearance of evidence is not uncommon and detainees are frequently asked for money in return for their release. There was even evidence that a prosecutor was bribed by a wealthy business man to secure the arrest of his business competitors.<sup>133</sup>

In the civil service sector more broadly, and perhaps specifically among judges, these corrupt practices have formed around shared group dynamics when colleagues encourage such behavior from each other. Integrity Watch Afghanistan found that forty-three percent of civil servants thought that corruption was the result of collaboration between colleagues, highlighting a "particular dynamic where individuals (civil servants) are compelled to be a part of a group collaboration in order to indulge in bribery and corruption. This 'system' can look unfavorably upon civil servants who resist corruption."<sup>134</sup> Inadequate training of Afghan judges also exacerbates the pressure to engage in corruption, particularly at the lower levels where judges are looking to their senior

131. INTEGRITY WATCH AFGHANISTAN, AFGHANS' EXPERIENCE OF CORRUPTION: A STUDY ACROSS EIGHT PROVINCES 6 (2007), available at <http://www.iwaweb.org/reports/PDF/AfghansExperienceOfCorruptionaStudyAcrossSevenProvincesUNDP2007.pdf>. <http://www.iwaweb.org/Afghanexperienceofcorruption.pdf>.

132. INTEGRITY WATCH AFGHANISTAN, AFGHAN PERCEPTIONS OF CORRUPTION: A SURVEY ACROSS THIRTEEN PROVINCES 63 (2007), available at <http://www.iwaweb.org/reports/PDF/AfghanPerceptionofCorruption13Provinces2006.pdf>.

133. TRANSPARENCY INTERNATIONAL, *supra* note 106, at 3.

134. INTEGRITY WATCH AFGHANISTAN, *supra* note 132, at 25.

peers for professional solidarity as well as leadership and guidance.

Moreover, Afghan judges consider their salaries inefficient and they are not paid on time.<sup>135</sup> Judges, like all civil servants in Afghanistan, receive no pensions and have no social security benefits. Inadequate compensation is likely a major motivation behind the extraction of bribes.

Physical intimidation by armed groups and warlords has also compromised individual judicial independence. According to the International Development Law Organization, Afghanistan's judges are "regularly targeted for attack or intimidation both by anti-government insurgents and by criminal gangs."<sup>136</sup> The Afghan Ministry of Justice also stated that in rural environments judges, prosecutors and other officials are often "subject to intimidation by local strongmen."<sup>137</sup>

These threats not only render the judiciary powerless towards these actors, but also feed the public perception that the judiciary is totally ineffective. For example, the Chief Justice of the Provincial Court in Herat was murdered after speaking out about his lack of independence and issuing a ruling against the wishes of Ismael Khan.<sup>138</sup> The incident contributed to wide-scale violence in Herat between the government and Khan's private forces. Without the physical security to issue rulings freely, judges are severely limited in their ability to exercise independent legal reasoning.

### G. Perceptions

From 2007 through 2011, the Asia Foundation surveyed men and women from all regions of Afghanistan, consistently finding that "many Afghans continue to view traditional dispute resolution mechanisms such

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135. Afghanistan Ministry of Justice, *supra* note 103, at 7.

136. IDLO, *supra* note 95, at 19.

137. Afghanistan Ministry of Justice, *supra* note 103, at 7.

138. Thier, *supra* note 13, at 1. As Chief Justice of the courts in Herat, *Mullah Khodaadad* labors under the heavy-handed rule of Ismael Khan, the *de facto* ruler of western Afghanistan. In 2002, Khodaadad told me about a murder case in a nearby village. The perpetrator was convicted by the eye-witness testimony of several villagers. Two days after his conviction, he was released – by order of Ismael Khan. Khodaadad complained of intimidation and lack of independence. In 2003, Khodaadad was hit by a car, an act many suspected was political violence. Then, factional fighting erupted in Herat in March 2004 during which Ismael Khan's son, a central government Minister, was killed and the central government-appointed military commander chased out of the province. Following the fighting, supporters of Ismael Khan burned down Khodaadad's house."

as *shura* and *jirga* more positively than they do the modern formal justice system such as state courts.”<sup>139</sup> In 2008, when asked if they were confident in the formal justice system, only 8% of Afghans replied that they were a “great deal” confident; 38% a fair amount; 33% not very much; and 16% not at all.<sup>140</sup> By 2011, 55% of Afghans respond that they are either a “fair amount” or a “great deal” confident in the formal justice system, representing a 9% increase from 2008, and a 17% increase in confidence from 2006.<sup>141</sup>

Figures 1 and 2 show popular views on various aspects of the state and traditional justice systems. Figure 1 shows that state courts are not necessarily thought to follow “local norms and values” or as less corrupt. In a separate survey conducted by Integrity Watch Afghanistan in 2009,<sup>142</sup> 52.6% of respondents said that the courts are the most corrupt government institution, and over 20% said that judges are the most corrupt civil servants, followed by public attorneys.<sup>143</sup> By comparison, Figure 2 shows that traditional justice is rated more highly in all aspects.

**Figure 1**<sup>144</sup>

	2007 (%)	2008 (%)	2009 (%)	2010 (%)	2011 (%)
State courts are accessible to me	78	68	68	73	77
State courts are fair and trusted	58	50	50	53	59
State courts are not corrupt compared to	56	47	47	49	56

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139. THE ASIA FOUNDATION, *AFGHANISTAN IN 2011: A SURVEY OF THE AFGHAN PEOPLE* 152, available at

<http://asiafoundation.org/resources/pdfs/TAF2011AGSurvey.pdf>.

140. THE ASIA FOUNDATION, *STATE BUILDING, SECURITY, AND SOCIAL CHANGE IN AFGHANISTAN: REFLECTIONS ON A SURVEY OF THE AFGHAN PEOPLE* (2008), at 21, available at

<http://asiafoundation.org/resources/pdfs/2008surveycompanionvolumefinal.pdf>.

141. THE ASIA FOUNDATION (2011), *supra* note 139, at 69.

142. Integrity Watch Afghanistan is a non-governmental organization dedicated to “increase transparency, integrity and accountability in Afghanistan through the provision of policy-oriented research, development of training tools and facilitation of policy dialogue.” The organization is funded by TIRI, UNDP, Overseas Development Institute (ODI), Open Society Institute, and the Norwegian Embassy. Available at <http://www.iwaweb.org/>.

143. INTEGRITY WATCH AFGHANISTAN, *supra* note 132, at 17-18.

144. THE ASIA FOUNDATION (2011), *supra* note 139, at 150.

other [government] institutions					
State courts follow the local norms and values of our people	57	50	49	51	57
State courts are effective at delivering justice	58	52	51	54	58
State courts resolve cases timely and promptly	51	38	40	42	47

**Figure 2**<sup>145</sup>

	2007 (%)	2008 (%)	2009 (%)	2010 (%)	2011 (%)
Local shura/jirga are accessible to me	83	76	79	86	87
Local shura/jirga are fair and trusted	78	70	72	73	79
Local shura/jirga follow the local norms and values of our people	76	69	70	70	77
Local shura/jirga are effective at delivering justice	76	69	69	69	75
Local shura/jirga resolve cases timely and promptly	72	59	64	66	73

The Asia Foundation also found that roughly 20% of urban respondents used the traditional system exclusively, compared to 45% of rural respondents. The emphasis on written documents in the formal system makes the system less accessible for the illiterate majority.<sup>146</sup> Interestingly, 18% of rural respondents reported using both the formal and informal systems, indicating that both systems offer relief in certain cases.<sup>147</sup> However, when asked about their satisfaction with the outcome of proceedings, more respondents were satisfied with the traditional

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145. *Id.* at 152.

146. USIP, *supra* note 74, at 363.

147. THE ASIA FOUNDATION (2008), *supra* note 140, at 55.

justice outcomes (65%) than with outcomes in the formal system (36%). This difference is perhaps related to the nature in which traditional justice emphasizes restorative dispute resolution, whereas formal proceedings apply the law with less emphasis on party satisfaction with the outcome.

The overall finding is that the Afghan population as a whole perceives traditional justice to be more accessible, fair, consistent with local norms and values, effective and efficient than the formal system. Perceptions of injustice, particularly in choosing the traditional system over the formal system, weaken the judiciary as a legitimate institution of the state.

#### *H. Resulting Conditions*

In sum, Afghanistan's present formal justice system is neither independent nor accountable, and it is not historically or culturally viable. These failings contribute to heightened instability and violence in the country. Furthermore, judicial corruption has led to increased potential for violent resistance, unrestrained drug trafficking, and alienation of the public.

Corruption in the formal justice system offends traditional values and reinforces the public's perception that the state threatens traditional ways of life. Integrity Watch Afghanistan found that many Afghans "felt neglected by the government, or even perceived the government as threatening."<sup>148</sup> Parties who pay bribes to judges perceive that the judicial system is not geared to protect their rights.

Public perception that the state will not protect and may even seek to exploit them could potentially lead to armed resistance against the state (such as occurred under Amir Amanullah in 1929). Moreover, the Taliban and other warlords could exploit the public perception in these provinces to broaden resistance against the state. Many citizens even perceive corruption in the formal judiciary as more pervasive than corruption in a Taliban-controlled traditional justice system. Integrity Watch Afghanistan found in 2007 that 60% of Afghans "perceived President Hamid Karzai's administration to be more corrupt than that of the Taliban, Mujahiddin or the Communist periods."<sup>149</sup>

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148. INTEGRITY WATCH AFGHANISTAN, *supra* note 132, at 34.

149. INTEGRITY WATCH AFGHANISTAN, *supra* note 132, at 7. Additionally, at 21, "In Pashto areas like Logar, Nangahar and parts of Mazar-e-Sharif the Taliban regime was seen with sympathy and was often described as one of the least corrupt periods in the

Another consequence of judicial corruption is that organized drug trafficking networks are able to operate freely by paying bribes to judges.<sup>150</sup> USAID argued that de facto judicial sanction of the drug trade, in conjunction with the drug trade itself, “are the most serious problems the country faces, and they offer the Taliban its only exploitable opportunity to gain support.”<sup>151</sup> Whether dealing with law enforcement officials or the judiciary itself, the Taliban uses bribery to evade the legal consequences of drug trafficking. Moreover, it uses drug trafficking to garner local support around the only major lucrative livelihood available for many rural peasants.

More broadly, corruption alienates ordinary people from the judicial process. “Ordinary people without *shenaz* or *wassita* [connections to officials] or without a sufficient proportion of it often find it difficult to maneuver through the hanging and often arbitrary prerequisites imposed by public officials.”<sup>152</sup> This situation creates the opportunity for a middleman, known as a *commissionkar*, to “act as brokers between public officials and citizens.”<sup>153</sup> In this way, what starts out as a bribe between two parties becomes a money-making opportunity for a third party, increasing the cost to the bribe-giver, who feels he has no other reasonable option to navigate the judicial process.

Although corruption also exists in traditional justice mechanisms, it is more accepted by the general Afghan population.<sup>154</sup> The disconnect between acceptance of corruption in traditional justice and rejection of corresponding practices in formal justice is rooted in the history of resentment and distrust between the state and rural society. In fact, 47.9% of Afghans in 2007 felt that state corruption “increased feelings of injustice and inequality,” fueling animosity towards the state. While

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political history of Afghanistan.”

150. TRANSPARENCY INTERNATIONAL, *supra* note 106, at 2.

151. USAID, *supra* note 80, at 11. Although Afghanistan has a special counter-narcotics tribunal, it is difficult to determine how the tribunal makes rulings or whether it convicts defendants selectively (such as defendants who are less powerful or who are unable to afford bribes).

152. INTEGRITY WATCH AFGHANISTAN, *supra* note 132, at 28.

153. *Id.*

154. INTEGRITY WATCH AFGHANISTAN, *supra* note 132, at 45-46. Like judges in the formal system, Integrity Watch Afghanistan found that traditional leaders might also be guilty of extortion, but found corruption in the traditional system is more accepted by the public. “Examples were given of *mullahs* in villages who used their position of the final arbiter in disputes to extort bribes. . . . Nevertheless, religious institutions enjoyed widespread acceptance despite the oft-mentioned local reality of bribe-taking *mullahs*.”

traditional leaders might sometimes engage in corruption, their general desire to protect and preserve their communities offers more support for the individual than the state.

1. *The formal justice system's rejection of traditional justice has alienated traditional leaders.*

Imposing a centralized and unfamiliar system of justice has severely alienated traditional authorities for decades, and has created a long-standing gap between traditional Islamic justice and attempts to modernize Islamic justice. Supreme Court Justices, under the 2004 Constitution, are not required to have higher education in traditional Islamic jurisprudence,<sup>155</sup> meaning that they are not necessarily mindful of its importance in their of line of work.

Furthermore, instituting new codes based on Sharia is not only a break with tradition, but also—especially for the *ulema*—blasphemous: “From the perspective of many, codifying Sharia amounts to imposing human limits on law of the Divine.”<sup>156</sup> Moreover, alienating Sharia from juristic power has diminished the overall legal weight of the Sharia itself in the formal judicial system: “No longer could the traditional jurists rely on their hermeneutical methods to determine what the law was; the new order had severed the organic link between the divine texts and the positive legal stipulations deriving there from.”<sup>157</sup> In this way, the development of Islamic law in Afghanistan has become subjected to secular authority.

Alienation of traditional religious leadership in the face of modernization reflects the top-down reform processes that have been the historical trend in Afghanistan.<sup>158</sup> Just as the Nizamiya reforms under Amanullah resulted in instability, contemporary top-down reforms will likely also contribute to instability. In order to promote reforms while garnering popular legitimacy, a bottom-up approach to the reform process is crucial.

Moderate religious leaders have been caught in the middle of the battle between insurgents and the state, with neither side offering them

155. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, Jan. 26, 2004, art. 118.

156. Ahmed, *supra* note 14, at 7.

157. *Id.* at 7, quoting Wael Hallaq.

158. Jones-Pauly & Nojumi, *supra* note 15, at 851. “Dethroning the masses as depositories of knowledge of custom in order to privilege only a few to act as exclusive depositories of that knowledge can produce resentment and ensuing instability.”



protection.<sup>159</sup> If these religious leaders choose to support the government, insurgents will attack them.<sup>160</sup> If they side with the insurgents, the insurgency gains not only their support but also the support of the religious leaders' communities. The state must employ the same bottom-up strategy as the insurgents in order to develop true collaboration with traditional leaders without making them targets for violence. The ultimate goal of such a strategy is to ensure that the popular legitimacy gained through mutual cooperation will give individual communities the ability and the desire to abandon their support of insurgent groups.

## V. INTERNATIONAL AGENDA FOR JUDICIAL INDEPENDENCE AND RULE OF LAW

### A. Introduction

The international agenda for judicial reform has failed to recognize the interrelated ways in which judicial independence, corruption, and traditional justice impact the legitimacy of Afghanistan's formal justice system. Immediately after 2001, the donor model relied heavily on past experience and was not sufficiently attentive to Afghanistan's unique environment and local views. Although many international actors generally recognized the importance of traditional justice, there was hesitation to engage with it in practice, largely due to concerns about religious extremism and human rights.

Immediately after 2001, the international community also neglected the justice sector in the period. The United Nations' "light footprint" approach of assigning Italy as the lead nation for the justice sector was severely misguided, as Italy's approach failed to recognize the importance of public consultation, capacity building, and positive relationships with local institutions.<sup>161</sup>

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159. PRIO, *supra* note 26, at 8. Borchgrevink argues that repeated alienation of traditional religious leaders is shrinking the space for moderate religious leaders that would be in an ideal position to build positive relationships between communities and the state: "Marginalization of and attacks on religious leaders – along with the government's inability to offer protection – contribute to widening the gap between religious actors and the government."

160. *Id.* at 53.

161. Matteo Tondini. *Justice Sector Reform in Afghanistan: From a 'Lead Nation' Approach to a 'Mixed Ownership' Regime*, 15 *TRANSITION STUD. REV.* 660, 664-65 (2009). "The institutional reform in Afghanistan started in Tokyo, on 22 January 2002 at the end of the International Conference on Reconstruction Assistance to Afghanistan. In

Since the late Ambassador Richard Holbrooke became Special Representative to Afghanistan in 2009,<sup>162</sup> much of the international agenda has shifted to work with traditional justice systems as well as the formal system.<sup>163</sup> This shift has caused concern among the formal sector's institutions, which have not yet decided how they wish to engage with traditional justice.

### B. Immediate Post-2001

International actors focused on using past experience to guide assistance and nation building in Afghanistan.<sup>164</sup> The approach "concentrated on ends rather than means, and its nation building functions were to be discharged by Afghans themselves with international donors performing only supporting roles."<sup>165</sup> While this approach is preferred for building local ownership and capacity, it must be balanced against an understanding that with limited capacity comes limited local ability and interest in exploring and addressing the full range of issues.

This delicate balance between passivity and imposition becomes particularly important when Western approaches to nation building may not be most effective. Indeed, "the plans for international assistance were driven both by the immediate conditions and needs in Afghanistan and, inevitably although more implicitly, by conceptual models of development and modern society that have generally been embedded in Western foreign aid strategies for more than two decades."<sup>166</sup> This unpreparedness for such a unique context, combined with Afghanistan's lack of experience in this area, led to incoherent and narrowly focused international support.

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addition to their financial commitments in the reconstruction, a few donor countries were entrusted with the 'lead' in the reform of specific sectors within the 'security and rule of law' area. . . . Generally speaking, the 'lead nation approach' generated a donor-oriented system, with broad bilateralization of planning and programming."

162. See Jodi Kantor, *Back on World Stage, a Larger-Than-Life Holbrooke*, THE NEW YORK TIMES (Feb. 7, 2009),

<http://www.nytimes.com/2009/02/08/us/politics/08holbrooke.html>

163. See North Atlantic Treaty Organization, *NATO Rule of Law Field Support Mission (NROLFSM)*, (June 9, 2011), available at

[www.isaf.nato.int/images/media/PDFs/110930rolbackground.pdf](http://www.isaf.nato.int/images/media/PDFs/110930rolbackground.pdf).

164. JOHN MONTGOMERY AND DENNIS RONDINELLI, *BEYOND RECONSTRUCTION IN AFGHANISTAN: LESSONS FROM DEVELOPMENT EXPERIENCE 5* (Macmillan 2007).

165. *Id.*

166. *Id.* at 15.

1. *The “Light Footprint” approach neglected the justice sector as a whole.*

Perhaps due in part to the assignment of a lead nation to support the justice sector, this sector was neglected by agencies that would normally play critical roles. The United Nations Assistance Mission in Afghanistan (UNAMA), for example, despite its concern for engagement with traditional justice, had no implementation responsibilities for the justice sector during the early years of reconstruction.<sup>167</sup> In response to the Judicial Reform Commission’s (JRC) mandate to “rebuild the domestic justice system in accordance with . . . Afghan legal traditions,”<sup>168</sup> UNAMA articulated a clear understanding of the importance of traditional justice,<sup>169</sup> yet never took up leadership on the issue. The lack of UNAMA leadership in encouraging the formal justice sector to engage with traditional justice contributed to international neglect of the traditional sector.

International funding was also lacking. The United Nations administers a Law and Order Trust Fund, which was established in 2002, but in the first two years the justice sector “received only \$11.2 million of the \$65 million requested for [that period].”<sup>170</sup> The United Nations Development Program was the primary source of financial support for the JRC, but the JRC only received \$500,000 during its first year of existence (a period during which it might have more robustly asserted itself).<sup>171</sup> The United States did support the justice sector directly, but its modest contributions were not matched by other donors.<sup>172</sup>

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167. Thier, *supra* note 13, at 13; *But see* S.C. Res. 1917, ¶ 6(b), U.N. Doc. S/Res/1917 (Mar. 22, 2010) (assigning leadership in the “international civilian efforts” to “support and strengthen efforts to improve governance and rule of law including transitional justice and to combat corruption at the local and national levels, and to promote development initiatives at the local level with a view to helping bring the benefits of peace and deliver services in a timely and sustainable manner.”).

168. Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (“Bonn Agreement”), art. 2, Dec. 5, 2001.

169. Wardak, *supra* note 1, at 333. Quoting the United Nations Assistance Mission in Afghanistan: “The issue of Afghan legal tradition refers to the customs, values and sense of justice acceptable to and revered by the people of Afghanistan. Justice, in the end, is what the community as a whole accepts as fair and satisfactory in the case of dispute or conflict, not what the rulers perceive it to be.”

170. USIP, *supra* note 73, at 11.

171. *Id.* at 6.

172. *Id.* at 5. “In 2003, the U.S. spent about \$13 million on rule of law activities other than police, including support for the Judicial Reform, Constitutional, and Independent

In the immediate post-2001 period, professional development issues were also widely neglected. The United States Institute of Peace (USIP) found that “[v]irtually nothing ha[d] been done to update the court structure, establish and apply qualifications for judicial personnel . . . ensure widespread access to legal texts for practitioners and students, develop court administration, improve the poor quality of legal education, or address deep-rooted corruption.”<sup>173</sup> Without giving attention to the development of quality personnel, efforts to build physical structure will not be effectively utilized and newly developing legal frameworks will not be appropriately applied.

A dearth of defense attorneys is another obstacle in redefining Afghanistan’s judicial system. In 2004, USIP found that “Defense attorneys [were] essentially unheard of.”<sup>174</sup> In 2008, the Asia Foundation’s survey found that the lack of defense attorneys remains high: 66% of respondents who used the formal system mentioned that they “pleaded their case alone or were helped by friends or relatives.” Another 22% said they used “professional legal services.”<sup>175</sup>

2. *Italy’s programs as “Lead Nation” and U.S.-led Rule of Law Programs were inflexible to Afghanistan’s struggle for legitimacy.*

At the donor conference in Tokyo in January 2002, Italy was assigned to be the lead nation to support the justice sector. The assignment of a lead nation was part of the United Nation’s “light footprint” approach of dividing up responsibilities to support Afghans without playing a direct role in implementation. This approach, however, was plagued by “limited powers, financial capacities and expertise of the selected ‘lead nations’.”<sup>176</sup> Some of the neglected issues described above, particularly in professional development, likely stemmed from Italy’s narrow focus. Because other actors assumed that Italy would play a robust leadership role, there was no unified strategy and coordinated

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Human Rights Commissions. (As insufficient as these amounts are relative to the needs of the Afghan justice sector, they made the U.S. the second largest donor to the sector.)”

173. *Id.* at 2.

174. *Id.* The only organization devoted to professional development for defense attorneys in the early years was the International Legal Foundation (ILF), “which launched a small training program in Kabul in August 2003, and which also provides some training through other organizations.”

175. THE ASIA FOUNDATION (2008), *supra* note 140, at 55.

176. Tondini, *supra* note 161, at 665.

capacity across all international actors.<sup>177</sup>

Italy operated through a multilateral channel and a bilateral channel.<sup>178</sup> Its multilateral channel oversaw financing projects through a range of international organizations, particularly UNDP and the International Development Law Organization (IDLO). These financing projects related to a number of issues, including administrative reform, penitentiary reform, juvenile justice, gender and justice, and the development of a National Legal Training Center. The IDLO provided training for all actors in the sector, including judges, attorneys, judicial police, Ministry of Justice staff, members of parliament, civil servants, and law professors.<sup>179</sup>

Through its bilateral channel, Italy created the Italian Justice Project Office (IJPO) to conduct research on conditions and legal frameworks, and to draft “three legislative texts, aimed to guarantee basic protection of human rights.”<sup>180</sup> This channel was widely seen as “focused mainly on implementation of its own projects, rather than coordination of broader efforts,”<sup>181</sup> including collaboration with its Afghan counterparts. The bilateral channel’s most significant contribution was the development of an interim code of criminal procedure, which President Karzai promulgated into law by decree in 2004. However, the code has been the subject of controversy because it was prepared by “Italian officials with help from U.S. military lawyers but relatively little input or support from the Afghan justice institutions”; furthermore, it was reportedly adopted “under strong foreign political pressure.”<sup>182</sup> By ignoring the importance of public consultation, capacity building, and building positive relationships with Afghan leaders, what little assistance Italy did provide has arguably been counterproductive in building sustainable rule of law.

The United States made similarly faulty assumptions. As of Spring

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177. *Id.*

178. *See generally* COOPERAZIONE ITALIANO ALLO SVILUPPO AFGHANISTAN, <http://www.coopitafghanistan.org/>.

179. *See* ROME CONFERENCE ON JUSTICE AND RULE OF LAW IN AFGHANISTAN, *Chairs Conclusions* (Jul. 2007), <http://www.rolafghanistan.esteri.it/NR/rdonlyres/C555AE7E-E27F-4475-A050-75BD50F2B637/0/RomeConferenceChairsConclusions.pdf>.

180. *Id.*

181. *Id.* at 5.

182. *Id.* at 8 (emphasis added). It is important to note Italy generated the interim code without regard for local participation, and President Karzai promulgated it into law in the least democratically legitimate manner (presidential decree) and without any kind of broad Afghan support.

2010, all USAID rule of law programming had to be directly approved by Special Representative Holbrooke. This meant that although the U.S. government was conscious of the importance of a strategy that unified the formal and traditional justice systems, USAID's response was that "we just need good laws."<sup>183</sup> Wade Channell, a Senior Legal Reform Advisor at USAID, explained that while responding to urgency and building legitimacy are often at odds, sacrificing legitimacy to meet urgent needs holds negative implications in the long-term:

Normally, laws derive from the surrounding culture and power dynamics, with strong historical underpinnings as well. Unlike a machine in which parts can simply be exchanged, the legal system is dynamic, much more akin to a human body in which parts *cannot* simply be exchanged because of the complexity of factors involved in the transplant. Urgency is sometimes required, but it must be accompanied by a long-term program of support to ensure that the transplant functions.<sup>184</sup>

This disregard for the importance of positive relationship building—the key to capacity building and sustainability—severely limited Italy's ability to address factionalism in the justice sector. In particular, Italy was unable to organize other donors because it struggled in its relationship with the JRC.<sup>185</sup> Although Italy was unwilling to collaborate with Afghans to create the interim code of criminal procedure, it was frustrated when it discovered that the JRC's work on the Master Plan was hurried.<sup>186</sup> Italy, as well as the Supreme Court and other important actors, felt it did not have sufficient opportunity to comment on the Master Plan's final draft.<sup>187</sup>

Rather than seeking to ameliorate the situation by further consulting with justice sector officials before the Master Plan was to be adopted, the Italian Ambassador "publicly welcome[d] the document in a coordination meeting hosted at their Embassy, but in private they

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183. Author's telephone interview with Wade Channell, Senior Legal Reform Advisor at USAID (Mar. 3, 2010).

184. Center for International Private Enterprise, *Urgency and Legitimacy: Tensions in Rebuilding the Legal Structure for Business in Post-Conflict Countries* 2-3, (July 30, 2010), [http://www.cipe.org/sites/default/files/publication-docs/Urgency%20and%20Legitimacy\\_0.pdf](http://www.cipe.org/sites/default/files/publication-docs/Urgency%20and%20Legitimacy_0.pdf).

185. USIP, *supra* note 74, at 6.

186. Thier, *supra* note 13, at 12. "Particularly galling for the Italian Embassy, which was funding the JRC salaries and offices, was that the plan had largely been written by American consultants." Although these American consultants should not have written the entire plan for the JRC, this outcome seems to point to the JRC's need for more hands-on assistance in light of their limited experience in such a role.

187. *Id.*

expressed their displeasure to the JRC leadership.”<sup>188</sup> In fact, the Italian Government attempted unsuccessfully to have the JRC dissolved.<sup>189</sup> The negative dynamic that developed between the JRC and the Italian Embassy hurt both: the JRC remained under-resourced, untrained, and decreasingly respected, and the Italian Embassy came to be “seen as a threat to Afghan leadership in the sector.”<sup>190</sup>

Local ownership in close collaboration with international advisors should yield plans and tools for reforms that are more likely to succeed. In this way, the partnership between local actors and international agencies is meant to be one in which each side brings something to offer, and neither side can accomplish sustainable reform on its own.

IDLO, in collaboration with the Italian government, was the main organization involved in professional training. Their approach to training was overly simplistic and failed to recognize the complexity of legal pluralism. By late 2004, the IDLO had provided “50 days (300 hours) of training to 450 persons over a 16-month period,”<sup>191</sup> but the effectiveness of this training was criticized. Language barriers in the context of highly specialized legal vocabulary was a major challenge.<sup>192</sup> Furthermore, the unresolved “patchwork of differing and overlapping laws [and] elements of different types of legal systems”<sup>193</sup> made it unlikely that participants would be able to successfully apply their training. In fact, in these early years, “to a great extent, the written law in Afghanistan [was] not applied – or even widely known, including by judges and lawyers. As one senior Afghan judicial official put it, Afghanistan ‘has many laws, but no implementation.’”<sup>194</sup>

### 3. *The international community as a whole hesitated to engage with traditional justice.*

Although many development agencies, such as UNAMA, recognized the importance of working with Afghanistan’s traditional justice systems, there was significant hesitation to engage with traditional leaders due, in part, to anxiety about religious extremism. The agencies

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188. *Id.*

189. *Id.* at 13.

190. *Id.* at 12.

191. USIP, *supra* note 74, at 10.

192. *Id.*

193. *Id.*

194. *Id.* at 5.

failed to acknowledge the important role that these leaders play in their local civil societies.<sup>195</sup>

Perhaps the primary cause for this hesitation was the dilemma in choosing between building legitimacy through engagement with traditional justice and promoting human rights standards. Italy's "light footprint" approach may have served as an excuse to avoid this dilemma, because engaging directly with traditional justice would equate to putting foreigners in roles that should be held by Afghans.<sup>196</sup> In Afghanistan, "the actual administration of justice remains under the control of the Afghan state (such as it is) and foreigners serve only as advisors."<sup>197</sup> Thus, international actors are challenged by unwillingness among Afghan officials to cooperate in the imposition of foreign laws. Italy's "light footprint" approach missed an opportunity to direct the attention of state officials and societal elites to an issue that must be addressed for the state to garner sustainable legitimacy.

International focus on the formal justice system over the traditional justice system has exacerbated pre-existing tensions between the state and predominately rural communities. For example, USAID has been wary to engage with traditional justice.<sup>198</sup> In 2005, USAID reported that a *jirga* or *shura* is "often staffed by ill-educated decision makers, relies on an unclear set of authorities and sources of law, can be inordinately and improperly influenced by local power, wealth or armed presence, and perpetuates norms and practices that are extremely detrimental to women."<sup>199</sup> While these statements were well founded, this analysis failed to recognize that traditional justice must play a critical role in establishing a system that carries more legitimacy than Afghanistan's current formal justice system.

USAID called for a top-down approach to engagement by educating rural *mullahs* in Islamic principles,<sup>200</sup> a tactic that likely generated resentment because *mullahs* believe that they are already applying

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195. PRIO, *supra* note 26, at 25. "Religious organizations are generally viewed with skepticism by the government, the international community and modern civil society." While the Bonn Agreement and the 'Afghanistan Compact' agreement of 2006 recognized the importance of strengthening civil society, this vague imperative has not been put into practice. *Id.* at 44.

196. Barfield, *supra* note 36, at 371.

197. *Id.*

198. This is in part because USAID tends to focus on deliverables rather than long-term processes.

199. USAID, *supra* note 80, at 9.

200. *Id.* at 15.



Islamic principles. Imposing training on religious leaders would deliberately seek to invalidate their perspectives, giving credence to the perspective that religious actors are rarely given a voice; rather, their voices are used.<sup>201</sup> Afghanistan's traditional leaders have historically resisted and rebelled against such alienation and imposition. Given the shrinking space for moderate religious leaders in the current insurgency, there is little reason to believe that attempting similar impositions in the present context would produce a different outcome.

### *C. Recent U.S. Assistance Explores Engagement with Traditional Justice*

By 2010, the international approach, led by former U.S. Special Representative Richard Holbrooke,<sup>202</sup> shifted towards greater engagement with traditional justice. This change took place, in part, because Afghanistan's formal sector has proven increasingly corrupt and ineffective and the U.S. was concerned about finding an exit strategy.<sup>203</sup> However, this shift may have exacerbated the problems of the formal justice sector by neglecting much needed training and advisory support for the formal sector. While emphasis on traditional justice intends to be realistic about rule of law in a largely tribal society, diverting resources away from the formal justice sector has the potential to: (1) exacerbate political influence and corruption in the formal judiciary, (2) fortify the sociopolitical hold that the Taliban and other warlords have on certain provinces, and (3) preclude sustainable rule of law, which would require genuine cooperation with traditional justice in order to gain legitimacy.

When international focus shifted to the traditional justice system, it is likely that the formal sector began resenting the informal sector and saw it as a threat to their institutional survival. If disputes may be brought before local *jirgas* rather than the formal system, the formal sector fears that sharing authority will preclude modernizing and centralizing the administration of justice, jeopardizing the continued existence of the formal institution and possibly the state itself.

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201. PRIO, *supra* note 26, at 48.

202. THE BROOKINGS INSTITUTION, MARC GROSSMAN INHERITS THE WORST JOB IN THE WORLD FROM RICHARD HOLBROOKE, (Feb. 15, 2011), *available at* [http://www.brookings.edu/opinions/2011/0215\\_grossman\\_afghanistan\\_riedel.aspx](http://www.brookings.edu/opinions/2011/0215_grossman_afghanistan_riedel.aspx) (Richard Holbrooke passed away in December 2010 and was replaced by Marc Grossman, "a veteran American diplomat called out of retirement").

203. Author interview with Jasteena Dhillon, Faculty of Arts and Sciences, Harvard University (Oct. 21, 2009).

Holbrooke's agenda has not been explicitly affirmed or revised by Special Representative Grossman.<sup>204</sup> However, in June 2011 USAID articulated a revised strategy on "Rule of Law and Anti-Corruption" that would support traditional justice by "building community elders' knowledge of Afghan law, sharia and human rights norms; encouraging alternatives to social practices that are harmful to women and children; and strengthening the connections between state actors and the informal systems."<sup>205</sup> USAID also plans to "[continue] to support the Supreme Court by providing professional training to judges and strengthening the capacity of the courts in managing and budgeting."<sup>206</sup> This new strategy recognizes the importance of engaging with both the traditional and formal systems and finding opportunities to help the systems work together. If these projects can bridge the gap between the two systems such that they can cooperate sustainably, Afghanistan may be on the road to rule of law at the national level. However, training traditional leaders on "Afghan law, sharia and human rights norms" and "encouraging alternatives to social practices," if imposed rather than considered collaboratively, patiently and respectfully, may tip the balance towards re-alienating traditional leaders and perpetuating Afghanistan's cycle of resisting centralized imposed rule of law.

#### VI. DISCUSSION: LEGITIMACY DEPENDS ON RELATIONSHIP-BUILDING BETWEEN THE STATE AND TRADITIONAL COMMUNITY LEADERS

The formal justice system of post-2001 Afghanistan is slow, corrupt, and unfamiliar to the Afghan population. The unwillingness of international actors to develop a contextually relevant approach that would directly address long-standing tensions between the state and society exacerbates this situation.

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204. Embassy of the United States, Kabul, Afghanistan, *U.S. Official Speeches & Interviews: SRAP Marc Grossman Afghan Media Roundtable Transcript* (Mar. 5, 2011), <http://kabul.usembassy.gov/030511.html>. Special Representative Grossman has articulated a three-pronged strategy: a military surge geared to improve security, a civilian surge gears towards development, and a diplomatic surge to "to create the politics that will be necessary to bring a political solution to this conflict, and an effort to make sure that other countries in the region, including Pakistan, are playing a positive role."

205. United States Agency for International Development (USAID), *Afghanistan: Democracy and Governance 1* (June 2011), available at [http://afghanistan.usaid.gov/documents/document/Document/1655/Fact\\_Sheet\\_Democracy\\_and\\_Governance\\_Sector\\_Jun\\_2011](http://afghanistan.usaid.gov/documents/document/Document/1655/Fact_Sheet_Democracy_and_Governance_Sector_Jun_2011).

206. *Id.*

Understanding “legitimacy” reveals why these failures in the administration of justice are so significant. Deconstructed foundational understandings of legitimacy indicate that pervasive corruption, failed independent institution building, and the rejection of traditional justice combine to generate a profoundly negative impact on the justice system’s legitimacy. These three issues must be addressed simultaneously in order to achieve legitimacy as a whole.

The Asia Foundation identified “tradition, charisma, and legal-rational procedure as potential sources of legitimate authority.”<sup>207</sup> The strategy in post-2001 Afghanistan was to garner legitimacy by setting up legal frameworks—whether or not they appealed to tradition or consulted with the public—and by issuing decisions—whether or not they were corrupt. This approach was misguided because, in a context where such frameworks did not have a history of popular acceptance, and where charisma is limited due to pervasive corruption and a long history of skepticism towards the state, appeal to tradition becomes critically important.

Appeal to tradition and demonstrated effectiveness are both necessary conditions for garnering legitimacy in Afghanistan, and therefore neither should be addressed at the expense of the other. The practical implications of this observation are that (1) successful anti-corruption and independent, sustainable institution building are necessary conditions for effectiveness, and (2) consultation and genuine engagement with traditional authorities is a necessary condition for successfully appealing to tradition. Both of these conditions are necessary to build legitimacy for cooperative administration of justice in Afghanistan. As the system garners legitimacy, sustainability becomes more feasible because the permanent institutions will be more secure and will have greater flexibility in pursuing the independent and accountable judiciary that Garoupa and Ginsberg theorize.<sup>208</sup>

Converting these required conditions into proscriptive objectives yields two observations. First, at the institutional level, anti-corruption efforts should be addressed in direct coordination with judicial independence strategies so as to minimize the independence/accountability tradeoff. Independence requires legitimacy, which in turn requires transparency and accountability, and which in turn requires the right people leading the justice sector’s permanent

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207. THE ASIA FOUNDATION (2008), *supra* note 140, at 13.

208. *See* Garoupa & Ginsburg, *supra* note 9.

institutions.<sup>209</sup>

If independence requires accountability through its dependence on legitimacy, then in Afghanistan, where politics is highly distrusted, Garoupa and Ginsberg's theoretical concept of a strong, accountable judiciary<sup>210</sup> is not an ideal but an *imperative*. Without independence, legitimacy is lost due to suspicion of politics, and without accountability, legitimacy is lost due to lack of credibility. If Afghanistan's judiciary does not become more accountable under the planning and implementation of institutions whose leaders share this understanding, then legitimacy will be lost through one or both of these channels.

Second, the popular legitimacy of the judiciary, as cultivated through cooperation with traditional justice, promotes independence. Facilitating coordination and cooperation between the formal and informal systems will promote sustainable independence for the formal judiciary, by creating a channel of legitimacy that is distinct from the executive and legislature.

A lack of legitimacy contributes to seeing the judiciary as political rather than independent. In 2005, USAID observed that "long years of extreme centralization and wildly oscillating sources of law (secular to theocratic) created a culture and work habit that guides the government staff to view the judiciary through a political lens."<sup>211</sup> Improving legitimacy through decentralized cooperation with traditional justice would allow the formal judiciary to distance itself from political pressures. The same USAID assessment recognizes that being accountable to a broader contingency, rather than political capture by those in power, requires flexibility and promotes legitimacy in the long run.<sup>212</sup> In this sense, building legitimacy is a process, beyond the institution of structures and rules, and this process begins with the values and practices held by society as a whole.

Legal development and institution building post-2001 was a top-down, centralized process that ignored the importance of custom because the international community and Afghan elites assumed that clear rules and structures would automatically be comprehensible and effective. Defining the pursuit of legitimacy as a decentralized, bottom-up process

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209. Thier, *supra* note 13, at 11.

210. Garoupa & Ginsburg, *supra* note 9, at 111.

211. USAID, *supra* note 80, at 5.

212. *Id.* "In a context of low or absent legitimacy in government institutions, there is some benefit to a fluid judicial framework, with an evolutionary and positivist approach to legal authority and sources of law."

of collaboration directly addresses the profound lack of understanding between the state, including the elites supporting it, and the majority of society. Collaboration between the state and society, with international assistance, would promote the evolution of a judicial system that is perceived by all to be modern, effective, and genuinely Afghan.

Relationship building between the formal system and the traditional system is critical for the formal sector to lead the way in bridging the gap with traditional justice, as well as for the formal sector institutions to have the legitimacy they seek to build with the general population. Because the debate between the formal and informal systems is a social one, not a religious debate,<sup>213</sup> the conflict over judicial reform exists between traditional leaders and the secular officials and judges of the formal system, not between the rural communities and the state. Whereas “both [the ulama and the state] claim to be vehicles of knowledge which can unify society,”<sup>214</sup> Afghan citizens simply look to leaders who they feel represent their own values and priorities.<sup>215</sup>

However, the conflict is not necessarily two-dimensional, as there is also disagreement and distrust among religious leaders, particularly between rural traditional leaders and those who are more connected to the state through the *Shura e Ulema*. “The *Shura e ulema* is not above the power game currently being played out in a number of forums . . . [it] is therefore seen by many religious leaders as a political body, attracting pro-government and populist religious leaders.”<sup>216</sup> The extent to which *mullahs* relate or consult with the *Shura e Ulema* depends on the viewpoints of the particular *mullah*.<sup>217</sup>

Without relationship building to bridge gaps between the formal and traditional leaders, the formal system will continue to be ignored, if not resented, by the majority of Afghan society. “Laws regulate one thing and one thing only: human relationships. When restructured without sufficient regard to relationships . . . laws will be ineffective at best or damaging at worst.”<sup>218</sup>

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213. Barfield, *supra* note 36, at 349. “Such opposition was not based exclusively on the secular modernizing content of the new codes, but rather on the impact all such state-imposed systems were perceived as having on Afghan society.”

214. ROY, *supra* note 28, at 28.

215. *Id.* at 29.

216. PRIO, *supra* note 26, at 28.

217. *Id.* at 30.

218. CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE, *supra* note 184 at 3.

## VII. RECOMMENDATIONS TO IMPROVE JUDICIAL INDEPENDENCE AND RULE OF LAW IN AFGHANISTAN

### A. *Introduction*

This section proposes a new agenda for judicial reform. The proposal seeks to establish genuine dialogue among traditional leaders, the formal justice sector, and civil society, supported by international actors. A genuine dialogue about intentions, practices, values, priorities, and interests is necessary to bring the formal and traditional justice systems together collaboratively, without resentment or competition.

Workshops on these issues should be piloted in communities where they are most likely to yield positive relationships, then replicated in more challenging areas. A similar model of dialogue may be employed at the national level. An effective and legitimate national working group might encourage the government to amend the Constitution and convert the group into a judicial council that would serve as a buffer between the judiciary and the executive. Although the prospects for realizing this strategy at the national level depend on questions of political will, successes at the local level would encourage political leaders and social elites that letting go of some authority in the present will bear fruits of stability in the long-term.

### B. *Cooperation is more sustainable than coordination.*

The general principle behind *coordination* between formal and informal justice systems is that “[i]t is important to give legal recognition to the outcomes of informal dispute resolution that is definitive but that does not compromise the rights of individuals to use the formal system if they so choose.”<sup>219</sup> A long-term approach to engagement with the two systems allows for the preservation of the aspects community cohesion promoted through traditional justice, while discouraging problematic practices over time:

Some ways of keeping order, such as blood feud, will never be acceptable and should disappear as state authority expands. Others, such as the use of *jirgas* or *shuras* to hear local disputes, are grassroots democratic institutions that should be encouraged. But precisely because such institutions give priority to the community over the individuals, disputants should always have the right to the formal legal system where they can get a hearing by (hopefully) more dispassionate judges, or demand enforcement of their rights through national law codes that apply

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219. Barfield, *supra* note 36, at 351.

to all citizens equally.<sup>220</sup>

In this way, the formal justice system provides the basic recourse to justice that all citizens are entitled to, but the state should also permit, recognize, and uphold decisions from traditional legal bodies.

Fortunately, the 2004 Constitution already allows for some legal pluralism. Courts are allowed to use Shia jurisprudence for Shia parties.<sup>221</sup> This indicates that the formal judiciary is already posed to deal with legal pluralism and should be able to receive guidance from religious leaders regarding customary law. Furthermore, the Constitution “leaves open the question of whether state courts possess, or must maintain, a monopoly over adjudication and justice.”<sup>222</sup>

“The formal and informal systems co-exist without official sanction or mutual recognition.”<sup>223</sup> *Cooperation* requires “a mutually beneficial link between the two systems, without threatening the integrity of either.”<sup>224</sup> Rather than a top-down division of jurisdictions without consultation or collaboration with traditional leaders, the referral procedure should be agreed upon by both sides, and should be seen as mutually beneficial to parties to disputes and to both systems’ leaders.

Regarding the review of decisions in the traditional system, constitutional individual rights are the basis that the state courts use for evaluating the legality of informal decisions.<sup>225</sup> The formal system, however, can enforce informal decisions only if all parties to a dispute agree to the formal system at the outset of the proceedings.<sup>226</sup>

An example of successful cooperation is the Norwegian Refugee Council’s “Information Legal Assistance Centers.” The legal assistance centers, which are composed of attorneys and judges from the formal system, use “jirga as a means of conflict resolution for returning refugees and internally displaced persons.”<sup>227</sup> This program exemplifies cooperation because representatives of the formal justice system help traditional structures handle an influx of disputes beyond a *jirga’s*

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220. *Id.* at 373.

221. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, Jan. 26, 2004, art. 131.

222. Jones-Pauly, *supra* note 20, at 830.

223. Barfield, *supra* note 36, at 3.

224. USIP, *supra* note 74, at 25.

225. *Id.* at 26.

226. *Id.*

227. *Id.* at 28. These attorneys and judges have often had legal training and professional experience in the formal judicial system.

capacity, and the formal system's involvement provides "more durable remedies."<sup>228</sup> Both sides recognized the need for collaboration and each other's positive roles, and international actors encouraged and facilitated this cooperative effort.

However, this example demonstrates that bringing about cooperation between Afghanistan's formal and informal systems requires not only a functional administrative model, but also relationship building to overcome decades of tension, distrust, resentment and resistance. Consequently, before any administrative model is put into place, a call for dialogue must begin the process of adjusting the attitudes of stakeholders—traditional leaders, formal sector officials, and other civil society leaders—to help them understand each other's practices and fundamental values.

### C. *A Call for Dialogue: The Legal Development Working Group Model*

Traditional leaders have the knowledge and the legitimacy to articulate and explore future paths for the administration of justice in their communities.<sup>229</sup> *Ulema* have sufficient knowledge of *urf* (custom), which is used "for listening and responding to ordinary men and women's everyday problems."<sup>230</sup> Sufi leaders, in addition to their knowledge of popular beliefs and values, have their own history of judicial authority and leadership. And *mullahs* and *maliks*, although they may not always have formal training, bring further understanding of their communities' values on issues of justice. In sum, "[T]he relative independence of the sphere in which *ulema* and local *mullahs* operate places them in a position to act as interlocutors between their own communities and external agents, such as the state, aid agencies and NGOs."<sup>231</sup>

The Legal Development Working Group Model emphasizes relationship building to lay a foundation for cooperation by including all perspectives. *Ulema*, Sufi leaders, *mullahs* and *maliks* could collaborate with officials in the formal justice sector to close the gap between customary and state institutions, both in terms of the law they use and the administration of justice. Placing these leaders in such a role would

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228. *Id.*

229. PRIO, *supra* note 26, at 6.

230. *Id.* at 25.

231. *Id.* at 6.



facilitate the development of a system of Afghan Islamic law that is applied by the formal courts and that includes customary laws.

Moreover, traditional leaders openly acknowledge that there is “a need for mutual trust and confidence building to collaborate in development.”<sup>232</sup> Indeed, they have recently expressed an overall willingness to engage with outsiders, including international actors and the state itself, despite various concerns. Regarding development, the main concern in some areas is “the protection of Afghan and Islamic values and traditions. As long as these were respected, the work of NGOs was generally welcomed and *mullahs* were keen to participate.”<sup>233</sup> With regard to the state, *mullahs* are open to being consulted, but feel that their voices are not being solicited. Moreover, many of them believe “that the gap between the government and the *mullahs* may increase if the government does not consult them.”<sup>234</sup>

### *1. Challenges of Implementation*

The first task would be to identify the right traditional leaders to act as members of a Legal Development Working Group and as liaisons between formal and informal justice. They must be sufficiently independent of corruption, knowledgeable of custom, and able to work with the state in a positive way. The greatest challenge would be dealing with warlords who have been controlling traditional justice in their dominions for years. Although these warlords are often personally responsible for acts of violence contrary to many if not all sources of Afghan values, excluding them from the process of legal development could leave their communities unrepresented. Warlords should be included only if they comply with an effective disarmament, demobilization and reintegration (DDR) program and only if they are deemed to be able to participate in a constructive debate with the group. Warlords facing prosecution should not be included. It would therefore be most effective to pilot this ‘working group’ model in areas where it is the most likely to succeed, and then transplant it to areas more deeply affected by warlords and the Taliban.

Once these leaders have been identified, building trust between them and the formal judiciary will entail working against decades of mutual animosity and distrust. The relationships built between the traditional

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232. *Id.* at 49.

233. *Id.*

234. *Id.* at 47.

leaders and the formal sector should be used (1) to allow the judiciary to incorporate customs from different regions into its rulings, (2) to develop Afghan Islamic law according to both intellectualized Islam and popular Islam, and (3) to coordinate between the formal and informal systems and to promote the formal system in rural communities. In order to debate and collaborate productively, members of the group should educate each other on customary laws, popular Islam, customized Islam, intellectualized Islam, and modern (Western) legal systems. The role of international actors should be to assist in forming this diverse group of collaborators, collecting field research on customary law and popular values in different regions, and facilitating healthy debate.<sup>235</sup>

Any attempt to build a unified system of justice from more than one tradition will face problems of hierarchization. International actors can facilitate healthy dialogue on these questions, ensuring that all voices are heard throughout the decision-making processes. These legal questions are inherently cultural and must be tackled by Afghans themselves in order for the resulting justice system to garner popular legitimacy. In this way, international collaboration, rather than imposition, can advance the rule of law more sustainably, while also engaging Afghanistan's central legal thinkers in a historically and culturally appreciative dialogue about the role of global standards, particularly women's rights, in Afghan legal development.

## 2. *The Inclusion of Women and Broader Civil Society*

Controversial customary laws regarding women and girls reflect a tension between modern Afghan civil society and religious leaders.<sup>236</sup> Involving female leaders in the Legal Development Working Group would account for their experiences and values, thereby not only garnering legitimacy through appeal to tradition but also embracing progressive development at the grassroots level. It would be useful to invite the Afghan Women Judges Association,<sup>237</sup> the Ministry of

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235. INTERNATIONAL LEGAL FOUNDATION, *supra* note 47. The recent report by the International Legal Foundation is a good example of research that can be used to improve the development of *urf* in the formal sector.

236. AFGHANISTAN RESEARCH AND EVALUATION UNIT, A CLOSER LOOK: THE POLICY AND LAW-MAKING PROCESS BEHIND THE SHIITE PERSONAL STATUS LAW (2009), *available at* <http://www.arei.org.af/Uploads/EditionPdfs/935E-%20A%20Closer%20Look%20-%20The%20Policy%20and%20Law-making%20Process%20Behind%20the%20Shiite%20Personal%20Staats%20Law.pdf>.

237. IRIN News, *Afghanistan: First Female Judges Association* (Jan. 9, 2003), *available at* <http://irinnews.org/Report/19248/AFGHANISTAN-First-female-judges->

Women's Affairs, female judges, and other female leaders to join Legal Development Working Groups.

Current efforts in the Afghan women's rights community have had only limited success, and the inclusion of women in a Legal Development Working Group would give them a more permanent place in Afghanistan's legal discourse. Capacity building, legal aid, and rights education are critical, but the Afghan Women Judges Association ought to be directly involved in legal development itself in order to shape the system in which they practice to better protect the rights of women. The current limits of women's rights advocacy are particularly evident in the work of the Ministry of Women's Affairs. The Ministry's Legal Department advocates in cases of domestic violence, divorce, compulsory marriage, financial claims, and other cases in which the rights of women have been violated under the Ministry's interpretations of Islamic law and international conventions.<sup>238</sup> However, the courts often do not accept their legal arguments. Without direct involvement in the official legal development processes, leaders and scholars on women's rights in Afghanistan will depend solely on individual judges, particularly female judges, to bring justice to women.

The Women and Children's Legal Research Foundation holds community dialogues with tribal leaders on tribal practices that are harmful to women and bring discord to the community as a whole. These dialogues are sometimes successful, indicating that the use of similar techniques in the justice arena, eventually at the national level, could be fruitful.<sup>239</sup> At the end of a workshop in Khost, a *jirga* member came forward to express his changing views on the traditional practice of *bad*:

I am the one who has been in such meetings several times and decided to give women as *bad* to settle a dispute. My intention was always to bring peace back to the family. But I never thought about how harmful this tradition could be.<sup>240</sup>

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association. "Funded by the United Nation's Development Fund for Women (UNIFEM), the Afghan Women Judges Association (AWJA) aims to ensure the active participation of female judges and lawyers in the judicial system, as well as to promote quality and reliable legal advice for vulnerable Afghan women countrywide."

238. Afghanistan Ministry of Women's Affairs, *Report of Legal Department on the Violence Against Women*, (Jan. 2005), available at <http://mowa.gov.af/en/page/1348> (last visited May 2010).

239. Diana N. Rowan, *Afghan Women Leaders Connect: Profiles in Leadership, Hangama Anwari* (2007), available at [www.afghanwomenconnect.org](http://www.afghanwomenconnect.org). (last visited May 2010).

240. *Id.*

Workshop leaders gave copies of their report on the consequences of *bad* so that this *jirga* member could explain it to the other members of his *jirga*. A similar process could take place in an official Legal Development Working Group, making a national impact on the protection of women's rights. The needs of children and the elderly, particularly as victims of conflict, could also be better understood and addressed through this process.

*D. Linking this Model to Institution Building and Reform at the National Level*

Linking the process of relationship building to improved legitimacy and rule of law will require the formal sector institutions to perform effectively and accountably. The agenda for building the independence of the formal judiciary should balance immediate and long-term needs by simultaneously focusing on direct judicial training and sustainable institutional relationships.

There is an immediate need for judicial training, particularly in terms of ethics; however, there is no applied code of ethics for judges. Afghanistan needs a Code of Ethics for judges and a separate Code of Ethics for clerks, specifically outlining proper procedure and conduct for those particular positions.<sup>241</sup> Practical training on these codes of ethics, both for students and practicing judges and clerks, will ensure that judges and clerks understand the rules against bribery, clientelism, and other forms of altered impartiality. Training on the codes of ethics must be accompanied by enforcement, which is central to the need for institutional reform. Other areas of training such as procedure, legal analysis and decision writing are also relevant to a comprehensive anti-corruption strategy because practitioners' diminished capacity in these areas could be exploited so as to compromise impartiality.

The content of this training remains a sensitive issue, however. As explained above, the constitution allows for the incorporation of arrangements agreed upon in local Legal Development Working Groups in terms of the application of customary laws and formally incorporating referrals with the traditional system into formal procedure. As more communities develop arrangements through their Legal Development Working Groups, these solutions become more readily adoptable at the national level.

The sequence for addressing local and national needs therefore

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241. USAID, *supra* note 80, at 18-19.

becomes increasingly complex. Both the national and local levels require immediate attention, but the fundamental issues that must be resolved in order to move forward must be effectively addressed first at the local level. USIP rightfully argues that the issues of legal pluralism and factions in the justice sector must be resolved in order for the administration of justice as a whole to be coherent:

It is imperative that organizational arrangements ensure that Afghans, with international assistance, decide how their judicial system should look and function, but addressing such issues as the role of Sharia and tribal traditions and respective roles and authority of the various institutional actors in the justice sector. Until such issues are addressed, any new commission or advisory body – in all likelihood involving personnel from the various institutions – will continue to be fractious.<sup>242</sup>

Fortunately, much of the factionalism in the formal sector has recently dissipated, largely due to (1) an influx new officials in the Ministry of Justice, Supreme Court, and Attorney General’s Office, and (2) these officials finding themselves too occupied with implementation responsibilities for factionalism to continue.<sup>243</sup>

Some progress has been made in discussing the role of traditional justice. The U.S. Institute of Peace convened a task force on engagement with traditional justice, composed of representatives from the three permanent justice institutions, as well as the Ministry of Women’s Affairs, the Afghan Independent Human Rights Commission, and UNIFEM, among others.<sup>244</sup> The group agrees on the importance of engagement with traditional justice systems, but the Supreme Court is reluctant to finalize any recommendations.<sup>245</sup> A particularly promising sign is that these representatives and a range of international advisors signed a “Draft National Policy on Relations Between the Formal Justice System and Dispute Resolution Councils”, or traditional justice bodies.<sup>246</sup>

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242. USIP, *supra* note 74, at 18.

243. Author interview with Alexander J. Thier, former Director for Afghanistan and Pakistan at USIP, currently Assistant to the Administrator for the Office of Afghanistan and Pakistan Affairs at USAID. (Feb. 25, 2010).

244. *Id.*

245. *Id.*

246. See Afghanistan Ministry of Justice, *Draft National Policy on Relations Between the Formal Justice System and Dispute Resolution Councils* (Nov. 18, 2009); see also United States Institute of Peace, *Traditional Dispute Resolution and Stability in Afghanistan* 6 (2010) (“The 2008 National Justice Sector Strategy for Afghanistan [a document signed by all of the permanent institutions] requires the development of a national policy on state relations with community dispute resolution mechanisms.”).

However, this draft policy arguably continues to utilize top-down impositions to achieve engagement. In particular, no traditional voice was present in the development of the draft policy. The guiding principle of the Policy explicitly calls for exercising coercive authority over the traditional system: “Informal dispute resolution decisions need to be consistent with Sharia, the Constitution, other Afghan laws and international human rights standards.”<sup>247</sup> According to the Policy, the government will have oversight of traditional justice systems,<sup>248</sup> which resembles the reforms of Amanullah that alienated traditional leaders and resulted in exacerbated social tensions and violence. Therefore, although the reduction of factionalism in the formal sector and discussion of relations with traditional justice are positive developments, “the role of Sharia and tribal traditions”<sup>249</sup> cannot be addressed solely at the national level without producing alienation and resentment for traditional leaders at the community level.

Before an official National Task Force moves forward with discussions of genuine cooperation with traditional justice, a number of local Legal Development Working Groups should have already proven successful to serve as a model for the national effort. Rather than being entirely composed of either current or former justice officials, the task force should be made up of both current sector officials as well as respected members of the legal community, such as former justices, sector officials, accomplished attorneys and law professors. This would expand USIP’s current task force to include additional Afghan stakeholders, rather than limiting the group to those who are deemed to have implementation responsibilities. In order to build its own legitimacy as the effective leader of institutional reform, the National Task Force should start out as another working group with direct international facilitation to generate dialogue that strives to overcome intra-group differences and to establish goals, objectives, and programming plans that are agreed upon by all parties. In particular, international actors should strive to bring traditional leaders who have emerged as particularly capable, understanding of the purpose of dialogue, and representative of their regions to become members of the National Task Force.

The content of these plans is limited by the reality that building long-term sustainable judicial independence requires locating judicial

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247. *Id.*

248. *Id.*

249. USIP, *supra* note 74, at 18.

career decisions outside the Supreme Court, a change that would require constitutional reform. Indeed, part of the intention behind the current model of limited judicial independence is to uphold the central role of the executive according to the classical notion of an Islamic state:

The head of an Islamic state has the duty to administer the Sharia, and is therefore the highest judicial authority under Islam. The head of state delegates judicial jurisdiction, *wilaya*, to the *qazi*, who then administers justice. This jurisdiction can also be removed. Therefore, 'a consequence of the doctrine of *wilaya* in Islam is total lack of separation between the judicial and executive powers.'<sup>250</sup>

However, just as traditional justice values and practices are not static, the above conception of the role of the executive may be similarly dynamic, particularly as the state struggles desperately for legitimacy. If international support and facilitation can keep factionalism at bay, further dialogue and genuine collaboration will allow the National Task Force to emerge as an effective leader of reform. If the executive and legislature come to recognize and respect this body, there may be sufficient political will to amend the constitution in order to form a judicial council with this group as its basis.

#### *E. Concluding Thoughts: Opening a Door for Social and Political Transformation*

The bottom-up approach will require some professionalization in order to better understand the legal traditions and scholarship in all aspects of the Afghan justice systems. However, the purpose of such professionalization is to find compatible fundamental values of justice, rather than to negate certain perspectives.<sup>251</sup> Problems of hierarchization will arise, but finding commonalities can mitigate these tensions. In this way, transformation of the relationship between the state and society, and the legitimacy that is gained through such a transformation, depends on ownership in the process and the pace of change.

The ultimate objective is the perception of legitimacy and justice for all parties in Afghanistan: intellectuals, human rights groups, *ulema*, tribal leaders (*maliks* and *mullahs*), ordinary people both rural and urban, and ultimately militants themselves. Shifting ground in asking who and what represents Afghan values brings feelings of tension and frustration

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250. Thier, *supra* note 13, at 10.

251. Jones-Pauly & Nojumi, *supra* note 15, at 852. One way to achieve this is to understand the ethical assumptions underlying the interacting justice systems. The same approach would apply to the differences in the respective procedural processes.

to the surface: “When ideological confrontations erupt over laws that speak to religious values, the ownership over religious doctrine and thus the political and cultural dominance of traditional power-holders is challenged.”<sup>252</sup> However, this initial reaction to such an enterprise makes dialogue all the more important. It is the task of internationals leading the process to facilitate dialogue in order to work through these tensions, rather than letting them block the process.

Western involvement in such projects tends to raise suspicions that the West is trying to impose its own values and traditions. Therefore, it is critically important for international actors to constantly reiterate their intentions and remain mindful of their behavior. International perceptions of justice, particularly in terms of human rights protections, should not be discounted. A contextually relevant approach is most effective in the long-term. Without bringing all leaders together, the approach to judicial reform will continue to be top-down.<sup>253</sup> It is therefore critical that judicial reform through broad collaboration prioritizes not only legitimacy, but also progress and engagement in Muslim and global discourses on human rights, in order to build a judicial system that is perceived to be simultaneously modern, effective, and genuinely Afghan.

Recalling the necessary conditions for legitimacy outlined in Section VI, effectiveness and appeal to tradition are satisfied, respectively, by (1) successful anti-corruption and independent, sustainable institution building, and (2) consultation and genuine engagement with all sources of traditional authority. The Legal Development Working Group Model would appeal to tradition and contribute towards effectiveness, as collaboration with the formal system would better ensure that the needs of individuals are met and would take a wide range of perspectives into account. Dovetailing the success of Legal Development Working Groups with a national working group would address anti-corruption measures and sustainable institution building at the national level. If this model is implemented successfully, the state could begin to garner popular legitimacy.

Even if local Legal Development Working Groups are successful

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252. AFGHANISTAN RESEARCH AND EVALUATION UNIT, *supra* note 236, at 15.

253. KAMALI, *supra* note 18, at 248. Kamali argues:

If the future government is to be a mixed orientation to combine both conservative and reformist elements, reforms in family law may be slow to begin with but might subsequently follow a mild trend as is experienced in some of the Muslim countries of the Middle East.



and the national working group emerges as a leader of reforms, questions of political will remain as to whether top government leaders and the elites who support them are open to social transformation. However, as the Karzai government's legitimacy weakens and the struggle against insurgency continues, successes at the local and national levels may show the way to a president looking for answers, even in the face of ostracism by the elites. Such an evolution would cultivate political will for bringing bottom-up transformation to the national level such that the judiciary, as a powerful symbol of governance, achieves a level of legitimacy that is truly sustainable.